

**LEGAL ASPECTS OF COMPULSORY ACQUISITION
OF LAND IN PAPUA NEW GUINEA.**

BY

Mak Super

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**THIS THESIS IS SUBMITTED IN FULFILMENT
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DECLARATION

I hereby certify that the work embodied in this thesis is a result of my own original research and has not been submitted for a higher degree in any other University. Sources consulted for this work are duly acknowledged herein.


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G. M. S. Muroa

Tasmania, July 1987.

ABSTRACT

The power of compulsory acquisition has always been an important aspect in the acquisition of land for public purposes in the history of PNG. The Power, however, was abused during the colonial era by virtue of the fact that too many occupied lands were acquired by the Colonial Administration. These acquisitions led first, to shortage of land in many parts of the country and second, domination of Papua New Guinea's economy by foreigners, especially plantation economy. The successive post - Independence Governments of PNG have adopted an overall policy to redress the situation by acquiring foreign owned lands and redistributing them to nationals for subsistence farming or economic development so that they may participate in the economic development of the country.

This work examines the law relating to compulsory acquisition of land in PNG. In particular it examines the policies, laws and practices aimed at compulsory acquisition of land and their effects on the landowners. The work also proposes reforms to the laws relating to compulsory acquisition of land in PNG.

The work is divided into 8 chapters including introductory and conclusion chapters. Chapter one deals with the (i) introduction, (ii) definition, (iii) scope and methodology, and (iv) the structure of the work. Chapter two briefly outlines compulsory acquisition of land in pre - colonial times in PNG and examines the policies and the use of

compulsory acquisition power by the Colonial Administration during the colonial era. Chapter three examines the policies of the successive post - Independence Governments in the country in order to remedy some of the problems created by the Colonial Administration and to protect the land rights of Papua New Guineans. Chapters four, five and six of the dissertation examine some of general requirements of the power of compulsory acquisition including the procedures, public purposes and compensation for compulsory acquisition of land in PNG. Chapter seven of the work deals with the proposals for reforms to the law on compulsory acquisition in PNG. The final chapter (Chapter eight) is the conclusion of the work.

The thesis proposes several reforms to the law relating to compulsory acquisition of land in the country.

1. That the power of compulsory acquisition in PNG continue as it is essential to acquire lands the Government needs for development purposes in the interest of the greater national community. However, an amendment to the provisions of the Land Act is necessary to introduce a system of " compulsory lease " to replace the current system of compulsory acquisition.
2. That the payments of compensation to the dispossessed citizen owner, especially an automatic citizen, should be over and above the market value of the land compulsorily acquired to reflect the extra market values or non - economic values that Papua New Guineans often attached to their land.

However, the situation regarding payments of compensation to remedy grievances caused by colonial land acquisitions requires urgent review as there appears to be no proper guidelines for such payments and it has proved to be unnecessarily costly to the nation. That the payment of compensation to the dispossessed non - citizen owner should be less than the concept of the market value of the land. The Government should pay the dispossessed non - citizen landowner compensation based on what it considers just.

3. The imposition of two months time - limit under the present Land Act within which landowners are required to respond to a notice to treat is unrealistic and should be extended to six months as most of the customary landowners are still in the remote rural areas with poor communication and transportation systems. However, provisions be inserted in the Land Act to establish a minimum time - limit within which the Government must complete the compulsory acquisition once a notice to treat has been issued. The absence of such a time - limit could cause injustice to the landowners as months or years may elapse before the procedure for the acquisition is effected.

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ABBREVIATIONS

CPC Constitutional Planning Committee

CILM Commission of Inquiry into Land Matters

PNG Papua New Guinea

M. L. J. Melanesian Law Journal

UPNG University of Papua New Guinea

ANU Australian National University

UNFAO United Nations Food and Agriculture Organisation

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CHAPTER ONE

INTRODUCTION

Land is the most important and sacred resource in the lives of the people of Papua New Guinea (PNG). The importance which Papuan New Guineans accord their land transcends its market or economic value. Land is not simply an asset which can be used for economic production or traded for cash ; it is the basis of their existence and an essential part of their social , economic and political life.¹ The main reason for this is that the land represents a link between the past , present and the future generations. Papua New Guineans further regard land as an inalienable commodity because it provides security for them and their future descendants.² As Professor Sack notes:

“ to say that land in PNG owns the people, instead of the people owning the land,

1. For further readings on the importance of land in PNG, see Dove, J., Miriung, T. and Togolo, M., “ Mining Bitterness ” in Peter Sack (ed.), Problem of Choice: Land in Papua New Guinea's Future (herein after cited as Problem of Choice), ANU Press, Canberra, 1973 pp.181-183. On the same subject see pp. 32 - 39; 40 - 48; 97 - 106, 97; 151 - 158 of Problem of Choice. See also Zorn, J., “ Fighting Over Land ” (1976)4, M.L.J. pp.7-36, p.9; Antoninus, M., “ The Tolai Land Case ” in Appendices to Land Tenure in PNG, UPNG, 1976 pp.106-109; The PNG Commission of Inquiry into Land Matters Report (herein referred to as the CILM Report) 1973 Ch. 3; Haynes, C., “ Succession to Land in PNG: Choice of Law ” (1981) 9, M.L.J. 1 & 2 pp. 74-101, p.74; Trebilcock, M. J. and Knetsch, J. L., “ Land Policy and Economic Development in PNG ”, (1981) 9, M.L.J. 1 & 2 pp. 101-114.
2. Lynch, C. J. “ Customising the Law ” in Problem of Choice, pp. 87 - 96, p. 90; Dove, J., Miriung, T. and Togolo, M., *ibid.*, p. 183; Olewale, N. E., “ The Price of Progress ” in Problem of Choice, p. 43.

is almost true ".³ Because of the significance land plays in the lives of the people compulsory acquisition in PNG has been an issue of singular importance and a source of conflict in the history of the country. Despite this, there is very little academic comment on the issue of compulsory acquisition in PNG. It is this vacuum that prompted my research.

THE CONCEPT OF LAND IN PNG.

Given the importance of land, an explanation of land as a concept in PNG culture is imperative in this discussion. This is perhaps best done against a background of Common Law notions of land.

(i) The Common Law Perspective

In Common law land considered in its legal aspect is an immovable property and means a definite portion of the earth's surface. In more general terms, land comprehends any ground, soil or earth whatsoever, including fields, meadows, pastures, woods, moors, water, marshes and rock.⁴ In its more limited sense, it denotes the quantity and character of the interest or estate which a person may own in

3. Sack, P.G., " The Triumph of Colonialism " in Problem of Choice, pp. 200-208, p.200.

4. Reynard v. City of Caldwell, 55 Idaho 342, 42 P.2d 292, 296; Holmes v. U. S., C. C. A. Okl. 53 F.2d 960, 963.

land.⁵ Thus in Common Law land may include any estate or interest in land, either legal or equitable, as well as easements and incorporeal hereditaments.⁶ It used to be the view in Common Law that the ownership of land generally includes all the space above the land vertically upwards for an indefinite distance and all the earth beneath its surface down to the centre of the earth.⁷ However, the accepted view today is that ownership of land above the surface is subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted, by law. Thus, modern legislation renders the flight of aircrafts through an owner's vertical airspace not a trespass as long as it is a reasonable height above the ground.⁸ At common law, trees, crops and permanent fixtures such as fences and buildings are deemed to be part of

5. Holmes v. U. S., *ibid.*

6. Reynard v. City of Caldwell, *op. cit.*, (footnote 4) at p. 297; Jones v. Magruder, D. C. Md., 42 F. Supp. 193, 198; Lynch v. Cunningham, 131 Cal. App. 164, 21 P.2d 154; Cuff v. Koslosky, 165 Okl. 135, 25 P.2d 290; Petition of Burnquist, 220 Minn. 48, 19 N.W.2d 394, 401.

7. See Corbett v. Hill (1870) 39 LJ Ch. 547; Newcomen v. Coulson (1877) 5 Ch. D. 133; Bernstein of Leigh (Baron) v. Skyviews & General Ltd. [1978] Q.B. 478; Wandsworth Board of Works v. United Telephone Co. Ltd. (1884) 13 Q.B.D. 904; Kelsen v. Imperial Tobacco Co. (of Great Britain and Ireland) Ltd. [1957] 2 Q.B. 334; Pickering v. Rudd (1815) 4 Camp. 219; Lemmon v. Webb [1894] 3 Ch. 1; Gifford v. Dent [1926] W.N 336; Saunders v. Smith (1838) 2 Jur. 491. Cf. Commissioner for Railways v. Valuer - General [1974] A.C. 328, 351; Sovmots Investments Ltd. v. Secretary of State for the Environment [1977] Q.B. 411. See also Riddal, J.G., Introduction to Land Law, Butterworths, London, 1974 pp. 44 - 46; James, R. W., Land Tenure in Papua New Guinea, UPNG, Port Moresby, 1978 Ch. 2; Brown, D., Land Acquisition, Butterworths, Sydney, 1973 Ch. 10; Simpson, S. R., Land Law and Registration, Cambridge University Press, London, 1976 pp. 5 - 8.

8. R. v. Trent River Authority, Ex parte National Coal Board [1969] 2 W.L.R. 653; Walker, D. M., The Oxford Companion to Law, Clarendon Press, Oxford, 1980 pp. 710 - 711; Ramsay, R. J., Handbook on Law Relating to District Officers.

the land.⁹ Thus, under the Common Law definition land includes the soil and everything below and above it that is annexed in such a manner that it becomes part of the soil. If land is acquired there is a presumption that the transferee takes the land above and below the surface.¹⁰ The Common Law notions can be distinguished from PNG customary law notions of land.

(ii) Land in PNG Customary Law.

Under PNG traditional law, land does not include trees, crops and permanent fixtures. Thus, it is often permissible for a person or persons to own the land and another person or persons to own the trees, crops and other improvements on the land.¹¹ The rights enjoyed by the latter are referred to as usufruct. The usufructuary has

Administrative College of PNG, Port Moresby, 1980 p. 83; At Common Law, gold, silver, and other minerals and mineral oils found in the soil belonged to the Crown by Royal Prerogative and were not deemed to form *partes soli*. The Commonwealth v. N. S. W. (1923) C. L. R. 1. In PNG the Mining Act (Amalgamated) Act 1977 states that all minerals and oils found in or upon land are the property of the State.

9. Geita Sebea v. The Territory of Papua (1943) 67 C. L. R. 544; Newcomen v. Coulson, op. cit. Cf. Attorney - general (Cth.) v. RT Co. Pty. Ltd. (1956) 97 C. L. R. 146; Commissioner of Main Roads (NSW) v. North Shore Gas Co. (1967) 120 C.L.R. 118; Anthony v. Commonwealth [1972 - 73] A. L. R. 769, for information on certain fixtures which are not deemed to form *partes soli*.

10. Manchester Corporation v. Rochdale Canal Co. (1971) 69 L. G. R. 517. Thus, in Manning v. Williams (1909) 9 S. R. (NSW) 903 it was held that the power to resume land did not entitle the Crown to resume a stratum to the depth of 50 feet, but the whole must be resumed *ad inferos*.

11. See James, R. W., op. cit., (footnote 7) Ch 2; Lynch, C. J., op. cit., pp. 87 - 96;

no proprietary rights in the land as such. The basis of this separation is that labour creates rights, therefore, he who is responsible for improvements on the land retains rights to them. Such a person has a power to remove his improvements on the land without trespassing. Indeed it is generally recognized under traditional law that he is entitled to claim compensation for the added value on the land.¹²

Ownership of Land in PNG.

Most of the land in PNG is owned by the people under traditional tenure. Indeed it is owned by a lineage or other group such as a clan or tribe.¹³ This category of land is often referred to as unalienated or customary land and accounts for 97 % of the total land mass in PNG. The other 3 % is owned by the Government and private

Kimmorley, C. W., " Destruction or Adaptation " in Problem of Choice, pp. 115 - 125. This situation may also be possible in Common Law. Perhaps the only difference between Common Law and custom is that in the case of the former, permanent improvements would be deemed to form part of the land, whereas in the case of the latter such improvements would not be deemed to form part of the land as such.

12. Lynch, C. J., *ibid.*, p. 88.

13. *Ibid*, p. 90; Kimmorley, C. W., *op. cit.*, (footnote 11) p. 116; Dove, J., Miriung, T. and Togolo, M., *op. cit.*, (footnote 1) pp. 181-189; Gunton, R. J., " A Banker's Gamble " in Sack (ed.) Problem of Choice, ANU Press, Canberra, 1973 pp. 107-114; James, R. W., *op. cit.*, (footnote 7) Ch. 2; Goava, S., " Land Registration Policy " in B. Acquaye, and R. Crocombe (ed.) Land Tenure and Rural Productivity in the Pacific Islands, UNFAO, Rome, 1984 pp. 47-62. Also see the facts of Geita Sebea v. The Territory of Papua [1941] 67 C.L.R. 544 where it was established that the lands in issue in that case were communal lands.

individuals or companies and is referred to as alienated or non - customary land.¹⁴ As most of the land in the country is still held by customary landowning groups, the Government will usually acquire the land from them to carry out its essential development programs. However, since land is such an important resource in the lives of most Papua New Guineans acquisition of land from customary landowning groups is not always as simple as it may sound, especially during post - Independence period. Quite often it will become most difficult to take land because people often either simply refuse to allow the Government to acquire their land or their compensation demands are too high. Where a minority group has refused " unreasonably " to give up their land or interests therein to the Government for development programs beneficial to the public at large the Government can invoke the power of compulsory acquisition and take the land in the interest of the public and compensate the landowners. The compulsory acquisition power therefore becomes extremely necessary to take land needed for development programs in the event where landowners refuse " unreasonably " to voluntarily surrender their land to the Government for such purposes.

THE CONCEPT OF COMPULSORY ACQUISITION.

Compulsory acquisition of land is the taking of land or interest in the land from the

14. The CILM Report , Ch. 4; James, R. W., op. cit., (footnote 7) pp. 20 - 22; Eaton, P., " More Stop than Go: Customary Land Policy since the Commission of Inquiry

owner without his consent. It is essentially the coercive taking of private lands (individual or communal) or estates and interests thereon for public purposes. It is concerned with complete interference with a citizen's private property in the interest of the public.¹⁵ It is said that " in its general terminology, compulsory acquisition covers the whole of those circumstances where there is a purchase of a person's land (and by 'land' is meant not just the fee simple interest but any interest in land) by a statutory authority having power to take land in the event of non - agreement ...".¹⁶ In modern times the power of compulsory acquisition is the sovereign right of a state to appropriate private lands for public uses; it is a necessary aspect of sovereignty of government.¹⁷

The above definition implies two things: first, the authority exercising the power of

into Land Matters " (1983) Administration for Development, No. 20 pp. 43 - 51, p. 49; Sack, P. G., " Triumph of Colonialism ", op. cit., (footnote 3) p. 205; Haynes, C., op. cit., (footnote 1) pp. 74 - 101, p. 74; Antoninus, M., " The Tolai Land Case ", op. cit., (footnote 1) p. 106.

15. Umeh, J. A., Compulsory Acquisition of Land and Compensation in Nigeria, Sweet and Maxwell, London, 1973 ch. 1; Speedy, S. L., Compensation for Land Taken and Severed - Legal Research Foundation Inc., Auckland, 1978 p. 1; Lawrence, G., Condemnation: Your Rights When Government Acquires Your Property, Oceana Publications, Inc., N.Y., 1967 Ch. 1.

16. Gobbo, J., " Introductory Remarks " in Compulsory Acquisition of Land, Leo Cussen Institute for Continuing Legal Education, Melbourne, 1982 p. 2.

17. James, R. W., Land Tenure in Papua New Guinea, op. cit., p. 60; Lawrence, G., Condemnation: Your Rights When Government Acquires Your Property, op. cit., ch.1 ; Eccleston, M. J., " The Acquisition of Land in PNG - A Changing Scene " (1975) 1 Management in PNG 1 pp. 39-46.

compulsory acquisition is authorised by statute or by some executive charter or order as in the case of the early Colonials during the Protectorate, to take land. Thus, in png Ready Mixed Concrete Pty Limited v. The Independent State of PNG and Utula Samana and Samson Kiamba ¹⁸ where the applicant company, as holder of the legal estate (leasehold) in the land in issue, sought immediate vacant possession of the land, it was observed that the said company was not an 'authority' as it was not authorised by statute. Its action seeking vacant possession of the land, therefore, could not be characterized as an act of compulsory acquisition. Second, the authority taking the land and the owner thereof will normally attempt to purchase or sell the land in question in the first instance by agreement but if that attempt failed then the former party will invoke its compulsory acquisition power and compulsorily acquire the land. Usually land acquired in this way is for public purposes and compensation is paid to the dispossessed landowners for the loss of their land or rights over the land.

THE SCOPE OF RESEARCH AND METHODOLOGY.

The work primarily examines the compulsory acquisition of land in PNG. In particular it examines the policies, laws and practices aimed at compulsory acquisition and their effects on the landowners. The work also proposes reforms to the laws relating to compulsory acquisition of land in PNG that will satisfy both the Government on behalf of the community and the landowners who are directly affected by the acquisition.

18. [1981] P.N.G.L.R. 396.

Research for this work was conducted in Tasmania, Canberra and PNG. Apart from the books and articles used in the course of this research, questionnaires were also used in the research in PNG. Discussions were further held with experts on PNG land laws, individuals and authorities who either directly or indirectly involved in the process of compulsory acquisition of land in PNG. The use of the questionnaires was necessitated by two factors. First, the need to obtain from such persons and authorities practical informations on the good and bad effects of the exercise of compulsory acquisition power as they see it in PNG and their views as to how best it should be applied in the future. Also to ascertain whether any new measures being introduced to change the laws on compulsory acquisition, and if so, the grounds for such changes. Second, it was necessitated by the fact that in order to do balance research for the work of this nature one needs to rely not only on secondary sources, but also on important primary sources which were available only in PNG. The use of questionnaires and discussions held with various experts, other individuals and authorities in this instance were thus necessary in this regard.

THE STRUCTURE OF THE WORK.

This work is divided into 8 chapters, including the introductory and concluding chapters. Chapter 1 deals with an introduction to the work. Chapter 2 of the work examines compulsory acquisition of land in pre - colonial and colonial periods in PNG. Chapter 3 examines the policies, laws and practices of compulsory acquisition of the

successive post - Independence Governments of PNG. Chapters 4, 5 and 6 examine some of the requirements of the power of compulsory acquisition. Thus, Chapter 4 examines the procedures for compulsory acquisition of land, Chapter 5 examines the requirement that compulsory acquisition of land must satisfy the criteria of public purpose, and Chapter 6 examines the requirement that compensation is to be paid to a person divested of his land by compulsory process. Chapter 7 of the work highlights some of the proposals for reforms to the law relating to compulsory acquisition in PNG. Finally, Chapter 8 deals with conclusion.

CHAPTER TWO

HISTORICAL OVERVIEW OF COMPULSORY ACQUISITION OF LAND IN PNG.

INTRODUCTION

Compulsory acquisition of land is not a new phenomenon in PNG. Papua New Guineans had forms of compulsory acquisition before colonization. However, when Colonial Administration was established, the colonizers introduced their own form of compulsory acquisition which still exist today. The Colonial Administration, however, generally abused the compulsory acquisition powers during the colonial era which has subsequently resulted in general shortage of land in many parts of the country, among other things. For a proper understanding of the historical trend of the power of compulsory acquisition in PNG it is necessary to examine the situation as existed in pre - Colonial and Colonial times in this chapter.

(i) Compulsory Acquisition in Pre - Colonial PNG.

As indicated above compulsory acquisition of land is not a new phenomenon in PNG; it existed before colonization.¹ In pre - Colonial times there were two forms of

1. This is at least true in the Highlands of PNG where I have conducted field research in two Highlands Provinces. The purpose of the research was to ascertain whether there were any forms of compulsory acquisition in traditional societies in PNG during pre - colonial period. The provinces concerned are the Eastern Highlands and Chimbu Provinces. The specific areas in which I did my research are Bena

compulsory acquisition which were equally recognized by customary law. There were acquisition by conquest and acquisition by requisition. In the case of the former, land was acquired by one rival group from another rival group and, of course, it was through use of force. This is an external form of acquisition. In the latter case, land was acquired by a group or by an appropriate socio - political authority from within the group itself. In a way, this was an internal form of acquisition. For example, group X may compulsorily requisition land held by Mr. Joe and his family for a specific purpose (public purpose) such as a burial site, a public meeting place, fishing and hunting grounds beneficial to the group as a whole. This is because as mentioned earlier, land in PNG is owned by a group and not by individual or individuals. As such the group reserved the right to requisition land held by any member of the group for any of the purposes which the group deems necessary. This form of intra - group acquisition differed from external acquisition in that in the former case the title of the particular land remained within the landowning group whereas the reverse is true in the case of the latter. It is not the purpose of this thesis, however, to deal in detail with this form of compulsory acquisition. I will only deal with external compulsory acquisition of land by conquest which was replaced by compulsory acquisition by the Government.

From what has been said, it is clear that PNG customary law recognized compulsory acquisition by conquest. However, when formal colonial administration was

Bena in the Eastern Highlands Province and Chuave in the Chimbu Province. Although the research was only conducted in the two Highlands Provinces due largely to time and transport factors, I have no doubt that similar situation existed in other parts of the country.

established acquisition by conquest was prohibited under the repugnancy rules contained in the provisions of S.10 of the Laws Repeal and Adopting Ordinance 1921-39 and S.6 of the Native Customs (Recognition) Ordinance 1963. These provisions mean that customary law will generally be recognized, and applied, by the Courts in PNG. However, if a particular custom is repugnant to the general principles of humanity then that custom will not be recognised and applied by the Courts. This prima facie appears to render compulsory acquisition of land by conquest subsequent to the establishment of the Administration control invalid. The wording of the Acts, however, left open the questions on the status of land acquired before the Administration control was established.

The question as to the validity of such land acquired by conquest was contested for the first time in PNG in the case of Wena Kaigo v. Siwi Kurondo.² In that case land was acquired by conquest and occupied prior to the establishment of the Administration control in the area in which the dispute arose. It was established that the customary law of the area recognized compulsory acquisition of land by conquest and effective occupation prior to the Administration control in the area.³ The issue which was contested before Saldanha, J. was whether the custom of the area which recognized acquisition of land by conquest and effective occupation was repugnant to the general principles of humanity, thereby violating the provisions of S.10 of the Laws Repeal and

2. [1976] P.N.G.L.R. 34.

3. Ibid., at p.37

Adopting Ordinance and S.6 of the Native Customs (Recognition) Ordinance? And if so, whether the operation of these legislative provisions affected the validity of the acquisition in this instance and thus affected the ownership rights of the group which acquired the land?

The Court held that the custom in question was not contrary to the provisions of the Laws Repeal and Adopting Ordinance and the Native Customs (Recognition) Ordinance and that the acquisition was valid and effective for all purposes under the customary law of the area. Therefore, the provisions of the above Acts did not affect the ownership title of the group which acquired the land notwithstanding the fact that the land was acquired by conquest. This is because firstly, the subject land was acquired prior to the Administration control in the area and secondly, the custom of the area as the supreme law, before the Administration control was established, had recognized ownership rights of those who acquired the land as valid under the circumstances. That being the case the Court was bound to accord recognition to that custom. What the provisions of the Acts seek to prevent is the acquisition of land by conquest subsequent to the establishment of the Administration control in the area. In finding as it did, the Court was relying on, inter alia, the provision of the Land Title Commission Ordinance 1962-71, as amended, (S.42(b)) which provides that -

“... For the purposes of the Commission, in relation to the ownership of native land living persons who under native customs are regarded as owners of native land shall be treated as the beneficial owners of that land by native custom”.

Had the land in the instance case been acquired subsequent to the Administration control in the area the acquisition would have been invalid and ineffective. This is because Administrative control was established for the purpose of regulating peace, order and good government of PNG and as such one of the Administration's main concerns was to attempt to prevent fightings. Any acquisition of land directly resulting from fightings after the establishment of the Administration control, therefore, would be invalid and those who acquire it will not acquire a secure title. The decision in Wena Kaigo's case does not, of course, affect compulsory acquisition of land by requisition. Therefore, requisition is still a valid form of acquisition in PNG today.

Even though with colonization acquisition by conquest was abolished, the establishment of Colonial Administration also introduced a new form of external compulsory acquisition, that is, acquisition by the Colonial Administration itself. Such forms of acquisition have continued since the Colonial Administration till today.

(ii) Compulsory Acquisition in Pre - Independence PNG.

As Papua New Guineans already had forms of land tenure systems which were governed or regulated by their traditional law prior to colonisation, successive Colonial Administrations in PNG recognised the existing indigenous land rights. This was demonstrated by the policies of the early colonials to recognize and protect native

land ownership in PNG.⁴ In Papua, after the declaration of the Protectorate in 1884, one of the main concerns of the British Imperial Government was to protect the land rights of the natives against European settlers. Thus, Commodore Erskine solemnly assured the native people: " your lands will be secured to you ".⁵ This assurance was further strengthened by the instruction issued to Special Commissioner General Scratchley that he was to explain to the natives that he was sent to " secure to them the safety of their persons, the enjoyment of their property and particularly to protect them from being deprived of their lands by force of fraud ".⁶ The policy implied respect for existing native land ownership and the land tenure systems. The policy also implied that indigenous people owned all the land in PNG and as such they had the capacity to dispose of their land absolutely to any strangers including the Administration. Their rights to dispose of their land was recognised in law under the

4. For further readings on the policies of the early Colonial Administration with respect to native land rights, see James, R. W., Land Tenure in Papua New Guinea, op. cit., Ch. 3; Montgomery, D., A Handbook of Information for Senior Land Settlement Officers, Department of Lands, Surveys and Environment, Port Moresby, 1979 p.7; Oram, N., " Land and Race in Port Moresby " in Appendices (Part 1) to Land Tenure in PNG, UPNG, Port Moresby 1976 pp. 36 - 53 at p. 36; Leyser, J., " Title to Land in the Trust Territory of New Guinea ", in Appendices (Part 1) to Land Tenure in PNG, UPNG, 1976 pp. 77-85 at p.77; Sack, P. G., " The Triumph of Colonialism " in Problem of Choice, pp. 200 - 208; Haynes, C. E. P., Land Law and Land Policy in PNG : Text, Cases and Materials (Part 1), UPNG Printery, 1983; Spicer, J. A., " The Expropriation and Sale of German Plantations in the Mandated Territory " in Appendices (Part 1) to Land Tenure in PNG, UPNG, Port Moresby, 1976 pp. 86 - 89.

5. Sack, P.G., *ibid*, p. 204.

6. Oram, N., " Land and Race in Port Moresby ", op. cit., p. 36; Haynes, C.E.P., Land Law and Land Policy in PNG (Part 1), op. cit., p.4.

Colonial Administration.⁷

In New Guinea the situation was similar, Germany proclaimed New Guinea a colonial protectorate in 1884. The German Government assumed formal control in 1885 when the first representatives of the Neu Guinea Kampagnie arrived. The Imperial Charter of 17th May 1885 gave the company the right to administer New Guinea until 1st of April 1899 when the German Imperial Government took over the administration of the territory. Although no express assurances were made to the native New Guineans to protect their land rights or interests therein, as in the case of early British colonials to the Papuans, specific instructions were issued to the Neu Guinea Kompagnie to recognize and respect native land rights and interests in New Guinea.⁸ The German

7. See The Administration of the Territory of Papua and New Guinea v. Guba Doriga (1973) A. L. J. R. 621, most popularly referred to as the "Newtown" case. In that case there was a dispute as to the ownership of land in issue in the case. The Administration claimed that the subject land was purchased by officers of the Administration on behalf of the Crown in 1886. The native claimants who were respondents in the appeal to the High Court of Australia argued that their forbears, who owned the land at the time of the declaration of the Protectorship, had no capacity to dispose of land absolutely to strangers under the customary law of the time. The High Court, however, held that the natives at the time of the purported sale had the capacity to dispose of their land outright to any strangers including the Administration. Professor Rudy James commenting on the decision of the Court said: "The High Court's decision falls within the genus of colonial precedents which assert that a "primitive" people ... recognize a conception of "ownership" of land and have a legal system enabling the outright transfer of their land by sale to Colonial Administrators, missions and settlers ...". James, R. W., "The Role of the Court in Attempts to Recover Alienated Land" (1974) 2 M. L. J. pp. 270 - 273 at p. 271.

8. Leyser, J., op. cit., pp. 77 - 85; Sack, P. G., "The Triumph of Colonialism", op. cit., p. 204; Sack, Peter and Bridget, The Land Law of German New Guinea, ANU Press, Canberra, 1975 pp. 1 - 3

Administration in New Guinea, as their British counterparts in Papua, thus recognized existing native rights and interests in land.⁹

THE POWER OF THE COLONIAL ADMINISTRATION TO ACQUIRE LAND.

The power of the Administration in Papua during the Protectorate to acquire land was based on the terms of the Special Commissioner John Douglas' special commission dated 26 December 1885. The terms of Douglas' commission provided that he was appointed as Special Commissioner for the Protectorate, "in all respect to represent our Crown and authority in matters accruing therein, and further to take all such measures, and to do all such measures and things in the said Protectorate as in the interests of our service you may think expedient, subject to such instructions as you may from time to time receive from us or through one of our Principal Secretaries of State".¹⁰

There was obviously no express power to acquire land in the terms of Douglas' special commission. In Daera Guba v. The Administration of the Territory of Papua and New Guinea¹¹ one of the issues contested before Mann, C. J., Frost, S. P. J., and

9. Leyser, J., op. cit., p. 79; Sack, P.G., "The Triumph of Colonialism", ibid.

10. James, R.W., Land Tenure and Policy in PNG with Particular Reference to Unalienated Lands - Cases and Materials, UPNG, Port Moresby, p. 4.

11. App. 791969 F./Ct. See also the High Court decision on appeal in the same case in the Newtown case, op. cit., at pp. 627 et. seq.

Prentice, J., was whether the Special Commissioner had power to acquire land? It was argued on behalf of the native claimants that the instruction to John Douglas, as Special Commissioner, to protect the natives in the free enjoyment of their lands and possessions, indicated that there was no power of purchasing land at all, and that this was confirmed by Erskine in 1884 that no acquisition of land in the Protectorate will be recognized by Her Majesty. It was held, however, that having regard to Douglas' task to act on behalf of the Crown in an 'uncivilised country', this general power should be given full effect and is wide enough to include a power to purchase land. It was also held that the right to sell land is incidental to free enjoyment of it and the particular words contained in the terms of Douglas' special commission were not inconsistent with a power to purchase land. The assurance made in the Proclamation to protect native land rights seems to refer to the activities of undesirable persons purchasing lands from the natives, and was not intended to bind the Crown.¹²

On appeal to the High Court of Australia, the Court observed that the policy of the British Government at the time of the declaration of the Protectorate was that there should be no disturbance of the natives in the enjoyment of the use of their land except in so far as the Government might purchase land or acquire it by compulsion for public purposes or supervise any permitted purchase by the intending settlers. The policy of preserving the use of the land by the natives was to be implemented by preventing any persons other than the Crown from purchasing from them any interest in land and by

12. App 79/1969 F./Ct. *ibid.*, at p.7.

the Crown limiting its compulsory acquisition of land to acquisition for public purposes.¹³ The Administration's power to acquire land was subsequently accorded legislative recognition to be found in the early land legislation of the Possession, that the officers of the Administration had power to purchase and the natives to sell lands.¹⁴

The attitudes of the British and the subsequent Australian Administrations in Papua with respect to native land rights can be generally summarised as follows. First, the Administration recognized and respected native land rights generally. Second, they recognized that the natives had power to dispose of their lands to anyone including the Administration. Third, they recognized the power of the Administration to acquire land, among other things, by compulsory process.

In New Guinea the power of the Administration to acquire land was based on the terms of the Imperial Charter of 17 May 1885. Unlike the ambiguous terms of Douglas' special commission in Papua, the Imperial Charter expressly granted the Neu Guinea Kompagnie the exclusive right to acquire land in New Guinea. The Charter also granted the company the right to occupy and dispose of ownerless or waste and vacant land and to enter into direct negotiations with the natives and acquire from

13. The Newtown case, op. cit., per Barwick C.J. at p. 629.

14. See the Land Regulation Ordinance 1888, SS. 4 - 6; the Crown Lands Ordinance 1890, SS. V; XVIII; XX; the Land Ordinance 1911 - 40, SS. 6; 8; 10.

them native land or rights over land.¹⁵ At the same time the Imperial Charter made specific provisions for the Neu Guinea Kompagnie to recognize and respect native land rights in New Guinea.¹⁶ The Board of Directors of the Neu Guinea Kompagnie on 10th August 1887, in accordance with the provisions of the Imperial Ordinance of 20th July 1887, issued directions to the Kompagnie to institute thorough investigations prior to acquisition of land with a view to ascertaining whether or not land was cultivated or otherwise used by the natives.¹⁷

The power of the Neu Guinea Kompagnie to acquire land in New Guinea was accorded legal recognition in the Imperial Charter 1885. The Imperial Ordinance 1899 regarding the assumption of local sovereignty over the Protectorate of New Guinea provided that as from 1st April 1899 the power of acquisition of land in the Protectorate shall pass to the German Administration.¹⁸ The 1899 Ordinance, therefore, recognized the power of the German Administration to take land in New Guinea. This was later reinforced by the Imperial Ordinance 1903. The Ordinance authorised the

15. See Sack, P. and Clark, D. (ed.) German New Guinea: The Annual Report, A.N.U. Press, Canberra, 1979 p. 13; Sack, Peter and Bridget, op. cit., 1975 pp. 1 - 3; Montgomery, D., A Handbook of Information for Senior Land Settlement Officers, op. cit., p.2.

16. Leyser, J., op. cit., pp. 77 - 85; Sack, P.G., "The Triumph of Colonialism", op. cit., p. 204; Sack, Peter and Bridget, *ibid.*

17. SS. 1- 4 of the Directions Regarding the Procedures for the Acquisition of Land by the Neu Guinea Kompagnie of 10 August 1887 in Sack, Peter and Bridget, *ibid.*, pp. 19 - 22; Sack, P. and Clark, D. (ed.), op. cit., p. 14.

18. This Ordinance may be found in Sack, Peter and Bridget, *ibid.*, pp. 11-12.

Administration to resume or restrict land in the public interests.¹⁹ Thus, this Ordinance expressly empowered the German Administration to take land by compulsory process for public purposes.

Australian Administration in PNG.

Australia took over the administration of Papua in 1902 from Britain after the formation of the Commonwealth of Australia in 1901. After World War 1 Germany gave up the colony and Australia took over the Administration of New Guinea in 1921 by virtue of the Mandate System under the League of Nations. Australia administered Papua and New Guinea separately until after 1945 when they were jointly administered as one colonial unit by virtue of the provision of Article 5 of the United Nations Trusteeship Agreement as the Territory of Papua and New Guinea. Successive Australian Administrations in Papua and New Guinea stated a commitment to the principles to recognize and protect the land rights of the natives.²⁰ As their predecessors, the Australian Administrations thus prohibited private land dealings with natives but nonetheless retained the power of compulsory acquisition as demonstrated in the legislative recognition accorded to the power of the Administration to take land in the Territory.²¹

19. See *ibid.*, pp. 85 - 95.

20. James, R.W., Land Tenure in Papua New Guinea, op. cit., p. 29; Hasluck, P., "Land Tenure in Papua and New Guinea " in Appendices (Part 2) to Land Tenure in PNG, UPNG, Port Moresby, 1976 pp. 2 - 6. See also Leyser, op. cit., pp. 78 - 79.

21. See the Land Ordinance 1906 (Papua), S. 33; the Land Ordinance 1911 (Papua),

FORMS OF COMPULSORY ACQUISITION POWERS.

The land acquisition policies initiated by the successive Colonial Administrations in PNG have remained largely unmodified until the present day. These policies were purportedly designed to ensure full understanding of the nature of the transactions and to guard against over - alienation of the native lands or interests therein at the expense of the natives' future land requirements. Amongst these were the policies to resume land (i) by declaration as " waste and vacant " or " ownerless " and (ii) by compulsory process.

(i) Acquisition of " Waste and Vacant " or " Ownerless " Land.

This policy allowed the Administration to declare " waste and vacant " (in Papua) or " ownerless " (in New Guinea) without payment to anyone. This category of land was deemed by the Administration to be owned by nobody. It was not an alienated land nor was it customary land, and had no apparent owners; it was empty land.²² Where

S. 58; the Land Ordinance 1922, SS. 6; 8; 10; the Lands Acquisition Ordinance 1914, S. 13; Lands Acquisition (Town Planning) Ordinance 1949, S. 4; the Lands Acquisition Ordinance 1952, S. 14. There was also specific enactment, the Lands (Kila Kila Aerodrome) Acquisition Ordinance 1939, which was enacted specifically to resume the lands on which Kila Kila aerodrome was constructed. The land laws of Papua and New Guinea differed and it wasn't until the enactment of the 1962 Land Ordinance which amalgamated the land laws of the two territories.

22. However, in PNG there has never been such thing as " ownerless " or " no man's " land. All land in PNG society has always been owned by the people irrespective of whether or not it has been cultivated. In this regard see the discussions at pp. 30-35.

any land was thought to be ownerless, the Administration would acquire it as Administration land by declaring it as waste and vacant or ownerless. Although the power of waste and vacant or ownerless was a form of compulsory acquisition, the acquisition of this category of land need not satisfy the criteria of public purpose and no compensation was payable upon acquisition as in the case of compulsory acquisition.²³

There has always been legislation to allow acquisition under this process both in Papua and New Guinea which enabled the Crown or Administration to acquire land, which had never been alienated and of which there appeared to be no apparent owners, as waste and vacant or ownerless. In Papua, the policy was first incorporated into the Crown Lands Ordinance 1890. This Ordinance²⁴ together with the Land Ordinance 1906²⁵ enabled the Administration to acquire land as waste and vacant or ownerless provided that it " was not used or required or reasonably likely to be required by " the native owners " for building, agricultural or other industrial purposes ". An example which illustrates the operation of this legislative provisions can be seen in the declaration in 1901 of the areas on Paga and Tuaguba Hills in Port Moresby. The areas were declared Crown lands on the grounds that the natives had not used the

23. James, R. W., Land Tenure in Papua New Guinea, op. cit., Ch. 4; Chatterton, P., " The Historical Dimension " in Sack (ed.) Problem of Choice, A.N.U. Press, Canberra, 1973 pp. 8 - 15.

24. S. 23.

25. S. 11.

land for fifteen years and did not require them for agriculture.²⁶ The Land Ordinance 1911 - 40,²⁷ on the other hand, enabled the Administration to acquire lands which had never been alienated and of which there appeared to be no apparent owners as waste and vacant or ownerless.

In New Guinea, the policy was first recognized in the Imperial Ordinance 1899. The Ordinance, S. 2, provided that special property rights and other privileges enjoyed by the Neu Guinea Kompagnie by virtue of the Imperial Charter 1885 should pass to the German Imperial Administration of New Guinea. These rights and privileges included the rights to acquire land as waste and vacant or ownerless.²⁸ When Australia took over administration of New Guinea the policy was also incorporated into the Land Ordinance 1922 - 41.²⁹ The Ordinance contained somewhat similar provision as the Land Ordinance 1911 - 40 (of Papua) in that it enabled the Administration to acquire lands which had never been alienated and of which there appeared to be no apparant owners as waste and vacant or ownerless.

26. See Oram, N., " Land and Race in Port Moresby ", op. cit., p. 38; Haynes, C.E.P., op. cit., (Part 1), p. 7.

27. S. 8.

28. See S. 1 (a) of the Implementation Order for the Imperial Ordinance 1899 dated 1st April 1899. The Implemantation Order can be found in Sack, Peter and Bridget, op. cit., pp. 13 - 14.

29. S. 11.

The 1962 Land Ordinance had somewhat modified the power of waste and vacant or ownerless declaration. Under the Ordinance, expropriation was by a notice published in a gazette declaring that the land was not customary land. The subject land was then deemed conclusively to be not customary land.³⁰ If the declaration was contested by the customary owners, the land was deemed to be customary land until the claim of ownership on the part of the customary owners had been resolved by the Land Titles Commission or by the Land Courts if established in the area in which the land was situated.³¹

(ii) Compulsory Acquisition of Land.

Another land acquisition policy framed during the Protectorate to enable the Administration to acquire land was compulsory acquisition. The power of compulsory

30. S. 83. The declaration under the 1962 Ordinance was usually referred to as a "Section 83 Declaration".

31. S. 83(4) and (5) of the 1962 Land Ordinance. However, a different view was taken in In The Matter of the Land Titles Commission Ordinance 1962 - 71, No. 90 (30/3/77). In that case O'Neally, A. J. purported to state a general principle that the legislative provisions on the power of waste and vacant or ownerless declaration were merely regulatory and did not create or extinguish any authority or right of the Crown to waste and vacant or ownerless lands in PNG because since the proclamation of the Protectorate, the ownership of all waste and vacant or ownerless lands effectively vested in the Crown. If this general principle is correct then in the event of any dispute by the customary owners thereof as to the validity of a declaration, the land would be deemed to be Administration land until it was established otherwise. There are very few waste and vacant or ownerless declarations made now, however, the current Land Act, S. 75, has provision for doing so if the need arises. However, the validity of a declaration under S. 75 of the Act is now doubtful by virtue of S. 53(5)(e) of the PNG Constitution which permits

acquisition was first exercised in 1886 when the Administration in Papua required land at Hanuabada, in Port Moresby for a cemetery site. Rev. W. G. Lawes, a missionary of some ten years experience in Port Moresby area, raised an objection that compulsory acquisition would mean breaching the promise, made to natives when the Protectorate was declared, that their land would be preserved for them. However, despite this objection the land was compulsorily acquired and has remained a cemetery.³²

In Papua no provision, however, for compulsory acquisition of land was included in land legislation until the Land Ordinance 1906 was enacted. This Ordinance³³ together with the Land Ordinance 1911-40³⁴ made provisions for the Government to compulsorily acquire land, both alienated and unalienated land, from any owner. One important compulsory acquisition was made by the Administration in 1940 of the lands involved in the case of Geita Sebea v. Territory of Papua.³⁵ In that case the Administration in 1937 leased certain native lands from the native owners. However, shortly thereafter the Administration enacted the Lands (Kila Kila Aerodrome)

legislation to provide for the acquisition of ownerless or abandoned property, " other than customary land ". It could be argued, however, that in view of the view taken by the court in In The Matter of the Land Titles Commission Act above, such lands are not customary lands but State lands and therefore do not fall within the constitutional protection under S. 53(5)(e).

32. See Oram, N., " Land and Race in Port Moresby ", op. cit., p. 39; Haynes, C.E.P., op. cit., (Part 1).

33. S. 23.

34. S. 58.

35. [1941] 67 C.L.R. 544.

Acquisition Ordinance 1939 and compulsorily acquired the land under that Ordinance. Although there was no dispute as to the manner in which the land was acquired in that case, it provides an important illustration as to how "trickery" the Colonial Administration had been, as discussed earlier in this chapter, in relation to acquisition of native land. Trickery in a sense that the native owners agreed to lease the lands in question upon an understanding that at the expiration of the lease agreement the land would be returned to them presumably with whatever improvements made thereon. However, once the improvements were effected the lands were compulsorily taken.

It appears reasonable to argue that the Administration did not wish to see the lands returned to the lessors, the native owners, with all the improvements thereon at the end of the lease agreement nor did it wish to see itself obliged to continue to pay rents either under the existing lease or under any subsequent renewal thereof. The acquisition of the lands in this case, therefore, raises serious doubts as to whether or not it was carried out in good faith and the validity of the acquisition is open to dispute. This is supported by the fact that the 1939 Ordinance did not specifically authorize a public purpose. It could be argued that the enactment of the Lands (Kila Kila Aerodrome) Acquisition Ordinance was merely to validate an acquisition which would otherwise have been invalid under the circumstances.

As indicated earlier, in New Guinea provisions for compulsory acquisition were first made in the Imperial Ordinance 1903 which expressly allowed the German Administration to resume or restrict any land or interests therein "in the public

interest ... in return for compensation ".³⁶ When the Commonwealth Government of Australia took over the administration of German New Guinea, it inserted provisions in the Land Ordinance 1922-41³⁷ which provided that the Administrator may acquire land compulsorily for certain public purposes.

Acquisition of land under this process was firstly, for public purpose and secondly, in consideration of compensation payable for the land so acquired. These are basic principles of the exercise of the compulsory acquisition powers and were continued in force in the successive land legislation of the country including the Land Ordinance 1962.³⁸ The above principles are protected in the Constitution of PNG and form the

36. S. 1 (1) of the Ordinance which is herein referred to as the Imperial Ordinance 1903. This Ordinance may be found in Sack, Peter and Bridget, op. cit., pp. 85 - 95.

37. S. 69.

38. See S. 35 of the Land Ordinance 1906; S. 60 of the Land Ordinance 1911-40; S. 71 of the Land Ordinance 1922-41; S.1 of the Imperial Ordinance 1903; the Lands Acquisition Ordinance 1914, SS. 13; 26; the Lands Acquisition (Town Planning) Ordinance 1949, SS. 4; 5; the Lands Acquisition Ordinance 1952, S. 14; and the 1962 Land Ordinance, S. 17. The application of the 1914 Ordinance was expressly excluded from native lands while the 1952 Ordinance applied to such lands if required for a purpose connected with the defence or public safety of the country. The Lands Acquisition (Town Planning) Ordinance permitted the Administration to acquire or resume land by compulsory process for the purposes of town planning and compensation was payable for lands so acquired. The 1962 Ordinance amalgamated all the land laws of the country and included some new provisions including, among other things, a new method of acquisition by compulsory process and an improved provisions regarding compensation payments. See Montgomery, D., Land Settlement Branch Manual, Department of Lands, Surveys and Environment, Port Moresby, 1978 pp. 113-120. The 1949, 1952 and 1962 Ordinances applied to both Papua and New Guinea.

basis of the current law which is set out in the Land Act Chapter 185.³⁹ They will also be featured in the new Land Law Reform Bill (Final Draft) 1982 with certain modifications to the existing law.

CRITIQUE OF THE POWERS OF COMPULSORY ACQUISITION.

(i) Abuse of Waste and Vacant or Ownerless Acquisition Power.

As a form of compulsory acquisition the waste and vacant or ownerless land acquisition power was subject to abuse. For instance, with its monopoly on acquisition of land, the Neu Guinea Kompagnie acquired large areas of land without proper investigations to ascertain whether land was occupied.⁴⁰ When the German Imperial Government assumed responsibilities for the administration of New Guinea from the Neu Guinea Kompagnie the acquisition procedures were strengthened to ensure greater

39. See Parts IV and XI of the Act.

40. Failure to institute proper investigations prior to acquisition of native lands in this case was contrary to the directions regarding the procedures for the acquisition of land by the company in the colony. See Sack, Peter and Bridget, *op. cit.*, for the directions given to the company. The Neu Guinea Kompagnie's actions with respect to native lands in this instance have been largely responsible for the subsequent land shortage faced by Papua New Guineans in many parts of the country as discussed later in this chapter. It has been highlighted, however, that land was never equally distributed among the people or groups in different parts of the country in the first place, and alienation was also heavier in some parts than in others. Thus, there are groups who even now have more land than they can utilise. There are others whose traditional land holdings are, irrespective of alienation, inadequate for present needs. And there are groups who have lost most or even all their land through alienation. See Sack, P. G., "The Triumph of Colonialism", *op. cit.*, p. 206. See also Fingleton, J. S., "Land Policy in PNG" in D. Weisbrot, A. Paliwala and

protection for native landowners. However, it was noted that even in these circumstances the German Administration failed to adequately safeguard the native land rights and as a result in some areas people lost most of their arable lands through waste and vacant or ownerless declaration.⁴¹ At Lae, 11,721 acres of land were said to be acquired in this manner.⁴²

Early Administration officers declared waste and vacant or ownerless any land from which they could not see smoke rising.⁴³ In many cases there were villages on the land. In other cases it was hunting and gathering land or contained "ples masalai".⁴⁴ In PNG context no land was ever known as waste land or "no man's" land. All land has always been traditionally owned. Even if land is several miles away from the village, it still belongs to a particular group, for cutting timber or feeding the pigs.⁴⁵

A. Sawyerr (ed.) Law and Social Change in PNG, Butterworths, Sydney, 1982 pp. 105 - 189 for further discussions on this subject.

41. Such areas are Gazelle Peninsula in the East New Britain Province and around Madang township in the Madang Province. Sack, P.G., "Early Land Acquisition in New Guinea - The Native Version", in Appendices (Part 1) to Land Tenure in PNG, UPNG, Port Moresby, 1976 pp. 110 - 121 at p. 114; Fingleton, J. S., op. cit., p. 106.
42. The native owners had tried to claim their land back from the Administration but the law and the administrative action were heavily loaded against them. Land in a number of areas is still *sub judice* as a consequence of claims by original owners and/or their descendants. Oram, N., "Urban Expansion and Customary Land" in Sack (ed.) Problem of Choice, op. cit., pp. 170 - 180 at p. 171.
43. See the CILM Report, op. cit., p. 46; Chatterton, P., op. cit., p. 14.
44. "Ples Masalai" is a Papua New Guinean "Pidgin - English" phrase meaning sacred place.
45. See Kaputin, W., "Indefeasibility and Justice" in Sack (ed.) Problem of Choice.

Thus, under customary law it was possible for a group to own land that it did not occupy or that it used only for certain purposes. There was a greater risk, therefore, that injustice may occur. For instance, in under populated areas there may be large areas of land which were not apparently being used. Yet this land may well be claimed by a group who, because of the method of shifting cultivation commonly used throughout the country, did not often make gardens on it. Possibly they may hunt or collect bush materials on parts of this land or possibly they claim it only because their old legends were connected with the land. This is in conformity with the argument that as far as indigenous people are concerned there just is no such thing as waste and vacant or ownerless or "no man's" land in PNG and they view the alienation of it as a grave injustice, quite distinct from European version.⁴⁶ Numerous communities and their leaders have questioned many of the waste and vacant or ownerless declarations as being made over their traditional hunting, fishing and grazing lands.⁴⁷ Thus, transfer back to indigenous ownership of waste and vacant or ownerless lands will be a popular exercise.

op. cit., pp. 159 - 163; Kambipi, T.M., "Cash - Cropping and Population Pressure" in Sack (ed.) Problem of Choice, op. cit., pp. 126 - 133.

46. See Chatterton, P., op. cit., p. 14; Antoninus, M., op. cit., p. 108. (Kaputin, W., "Indefeasibility and Justice" in Sack (ed.) Problem of Choice, ANU Press, Canberra, 1973 pp. 159 - 163; Kambipi, T. M., "Cash - Cropping and Population Pressure" in Sack (ed.) Problem of Choice, ANU Press, Canberra, 1973 pp. 126 - 133.

47. For details see, James, R. W., Land Tenure in Papua New Guinea, op. cit., Ch. 4.

The Commission of Inquiry into Land Matters Recommendation Regarding Lands Acquired by Waste and Vacant or Ownerless Declaration.

The use of the ownerless or vacant land acquisition power enabled the Colonial Administration to occupy lands without the payment of compensation. The Colonial Governments of PNG had acquired a total of 308,000 hectares of land under this process.⁴⁸ Some freehold and leasehold titles have been granted over parts of it. Some towns are also built on the land. However, much of it is undeveloped. The acquisition of these lands has been a source of contention.⁴⁹ The CILM treated the declaration of rural waste and vacant or ownerless lands for which no payments of any kind were made to traditional rightholders as a special case. It recommended that undeveloped rural waste and vacant or ownerless land should be returned to people under registered customary leasehold title to people living on or near it according to need. Any left over were to be used for wider leasing to anyone with compensation to traditional owners or their descendants.⁵⁰ However, where traditional owners are acutely short of land for cash or subsistence cropping purposes, developed rural waste and vacant or ownerless land were to be recovered by the Government and returned it to them. The present freeholders and leaseholders were to be compensated for

48. The CILM Report, *ibid.*, p. 63. See also Antoninus, M., *op. cit.*, p. 106; Extract from the Official Yearbook of the Commonwealth of Australia, *op. cit.*, p. 55.

49. See James, R. W., Land Tenure in Papua New Guinea, *op. cit.*, Ch. 4; the CILM Report, *ibid.*, Ch. 4.

50. The CILM Report, *ibid.*, p. 63.

unexhausted improvements on the land. Where traditional owners are not acutely short of land, developed land under these circumstances were not to be returned but rightholders were to be compensated for the land itself and additional compensation for the loss of gardening, hunting, fishing and gathering rights.⁵¹

The CILM, however, felt that where there are big areas of virgin forest land and only a small population, the Government of PNG should declare some parts of the land which it believes, after investigations, has not been used for agricultural purposes to be national land.⁵² The criteria to be applied to decide whether land should be declared national land is whether the land has been used for any form of agriculture in the last 20 years.⁵³ If it has not been so used and the Government requires it for public purposes or for purposes it thinks will benefit the nation then it should declare the land to be national land. However, if it has been established that although people have not been exercising agricultural rights, they have been exercising non - agricultural rights, such as hunting and gathering on the land, these rights should be preserved and marked as encumbrances on the Government's title. If these rights are not preserved or are stopped, the customary rightholders be compensated for the loss of these rights. However, only those rights which are being exercised at the time of the declaration are to be preserved.⁵⁴ If any dispute arises as to whether people have been exercising

51. Ibid., pp. 66 et. seq.

52. The CILM Report, op. cit., Recommendation 55.

53. Ibid.

54. See Ibid., Ch. 6.

agricultural rights over the land, it can be dealt with by the court.

It should be noted that the power in this case is expected to be used mainly in sparsely populated rural areas. However, it should only be exercised where the land is presently needed.⁵⁵ Thus, land cannot be acquired in a sparsely populated area, even though it has not been utilised within the last twenty years, unless there is a present need for the land. It seems that the CILM believed the power of waste and vacant or ownerless declaration as applied in the colonial era was too wide and that the test of "use in the last 20 years" would limit its scope. This would ensure greater protection of the customary land rights, while at the same time enabling the Government to take lands which are not required by the owners for productive use rather than leaving them idle.

(ii) Abuse of Compulsory Acquisition Power.

As noted in the case of the waste and vacant or ownerless powers, the compulsory acquisition powers were also abused by the Colonial Administration as demonstrated in the following cases. Some early land acquisitions were made through excessive pressure or compulsion. For instance, when the lease of the site of Iduabada Technical College held by the Administration from the customary landowners expired in 1953, the landowners refused to renew the lease or sell the land. However,

55. Ibid.

considerable pressure was exerted on them and after 7 years they submitted and agreed to let the Administration take their land for 25 pounds per acre.⁵⁶ In another case the Administration needed a piece of land in Port Moresby owned by the natives of Kila Kila and Pari villages for Taurama Army barracks. The Administration compulsorily leased the land from the native owners and paid very small rent on the grounds that the land was needed for national defence. The Administration subsequently acquired the land by compulsory process and offered to pay 2 pounds an acre but the people refused to accept it. They were subsequently awarded 20 pounds per acre by an independent arbitrator.⁵⁷

The events surrounding the resumption of land for the immense Bougainville Copper project (B.C.L.) on North Solomons Province afford an additional useful example of excessive force employed by the Colonial Administration to compel the local people to sell their land to the Administration. It was alleged that in that case there was no prior consultation before the acquisition of the land or before the granting of a prospecting authority to the mining company over the people's land. Nor did the Administration consult the people before allowing the company to occupy their land.⁵⁸ The Administration had never adequately prepared the people to understand the probable

56. See Oram, N., "Land and Race in Port Moresby" op. cit., pp. 36 - 53.

57. See *ibid.* Also see Oram, N. D., "Urban Expansion and Customary Land", op. cit., pp. 170 - 180 at pp. 171 - 172.

58. See Dove, J., Miriung, T. and Togolo, M., "Mining Bitterness", op. cit., pp. 181-189, for the analyses of the circumstances surrounding the acquisition of the land in this case.

consequences to their life and property in the process of the resumption of their land. As a result of this the people hardly understood the Western laws and their harsh implications. The Administration simply took advantage of the people's ignorance.⁵⁹ Any subsequent explanations were inadequate and biased because the people were told only of the benefits and all negative effects of the acquisition were concealed from them. The compensation payment made to them was said to be grossly unfair bearing in mind the huge profits that are going to accrue to the company.⁶⁰ When the land - owners wanted to stand up for what they believed to be their rights the Administration employed brute force to subjugate the people and to force compliance upon them.⁶¹

The events surrounding the acquisition of land for the Bougainville Copper project were a typical example of the Administration's determination to achieve by resorting to force what it failed to achieve by peaceful means. The actions of the Administration with respect to the resumption of land in this case as well as in the other cases cited above could be described as giving a " lie " to its role as a protector of the people's rights and interests in land thus dishonouring the obligation which it undertook at the beginning of the Colonial era. Numerous instances have been documented where

59. Other instances of acquisitions effected by the Colonial Administration in ignorance of the landowners as to the implications of such acquisitions, see Oram, N. D., " Urban Expansion and Customary Land " in Sack (ed.) Problem of Choice, op. cit., pp. 170 - 180, p. 171.

60. Dove, J., Miriung, T. and Togolo, M., op. cit., p. 188.

61. The Administration deployed Police Force armed with batons, shields, tear gas and other modern police paraphernalia against peaceful demonstrations by simple, defenceless people whose livelihood was at stake. See *ibid.*, pp. 181 - 189.

lands were also being confiscated as punishment of individual's or groups for various offences perpetrated or alleged to have been perpetrated without compensation being paid.⁶² One very well - known instance of this situation was the land in issue in the case of the Director of Expropriated Property v. Tedep and Others,⁶³ commonly known as the " Varzin " case. Although the dispute in that case was based on the title of the land in issue, and not on confiscation, the manner in which the land was taken possession of initially best illustrates this point.⁶⁴ In another case certain lands were fought over by various clans and, although none of them were able to keep permanent settlements on the lands, all of them were said to have made overlapping claims to them. However, the Administration was reported to have acquired them without compensating customary rightholders for the loss of their rights.⁶⁵ It seems that there was no restriction on the theory of eminent domain in a colonial context and the indigenous inhabitants had no legally enforceable safeguard to receive prompt, fair or any compensation at all. One could argue from this that the Colonial Administration was cheating the people in spite of its unambiguous statements of protection of indigenous land rights.

62. See James, R. W., Land Tenure in Papua New Guinea, op. cit., pp. 107 - 109; the CILM Report, op. cit., Ch.4; Chatterton, P., op. cit., pp. 8 - 15; Sack, P. and Clark, D., op. cit., pp. 236 and 354; Leyser, J., " Title to Land in the Trust Territory of New Guinea ", op. cit., pp. 82 et. seq.; Sack, P. G., " Early Land Acquisition in New Guinea - The Native Version ", op. cit., 110 - 121.

63. [1964] 113 C.L.R. 318.

64. See Leyser, J., op. cit., p. 82 for details of the circumstances surrounding the acquisition of the land.

65. The CILM Report, op. cit., p. 46.

The Administration's approach to acquisition of the people's lands can be described simply as a highhanded and misguided approach. This highhanded and misguided approach adopted by the Colonial Administration in acquiring people's lands has resulted in the problem of land shortage associated with alienated lands in many parts of the country today. There are two aspects to the problem. The first is that the alienation of land during the Colonial Administration has resulted in a general shortage of land in some areas. The extent of this shortage varies from place to place, and it has been contributed to by fairly high population increase in recent years. However, there are areas where, as a direct consequence of the alienation of land, the people are now seriously short of land even for subsistence farming purposes.⁶⁶ The other aspect of the problem is that on the eve of self - government and subsequent independence PNG was faced with a considerable part of its economy, particularly plantation economy, still largely in the hands of foreigners. This situation was intolerable because it was inconsistent with certain fundamental principles for national improvement known as the Eight Point Improvement Plan or Eight Aims for short which were adopted during the transitional period to self - government and the eventual independence. The Eight Aims call for, *inter alia*, a rapid increase in the proportion of the economy under the control of Papua New Guinean individuals

66. Areas around the Gazelle Peninsula and the Duke of York Islands in the East New Britain Province and the northern part of the New Ireland Province are notable examples of areas which are facing serious problem of land shortage. See Papua New Guinea's Proposal to Australia for a Joint Scheme for Settlement of Alienated Land Problems, a Classified ("Secret") document, Port Moresby, 1974 p. 1. See also Fingleton, J. S., *op. cit.*, (footnote 40).

or groups.⁶⁷ The next chapter examines some of the measures instituted by the successive Post - Independence Governments in PNG to deal with the problems mentioned thereof.

CONCLUSION.

The successive Colonial Administrations in PNG recognized land rights of the indigenous population. Various land policies were introduced to give effect to this recognition and to protect native land or rights and interests therein, including prohibition of private land acquisitions in the country. However, we have noted that the Administration did not always strictly adhere to these policies. In many cases they abused their powers by declaring occupied lands as waste and vacant or ownerless and lands were compulsorily taken through excessive pressure or force with very little or no compensation at all. This has generally led to, *inter alia*, the problem of land shortage associated with alienated lands faced by Papua New Guineans in many parts of the country today. We have also noted that there has been a lot of discontentment amongst customary landowners in PNG in relation to the waste and vacant or ownerless land declarations. They claim that most of the colonial waste and vacant or ownerless declarations were made over their customary land. Thus, although the colonizers asserted the existence of ownerless land, Papua New

67. Ibid. For further information on the Eight Point Improvement Plan, see the CPC Report, op. cit., pp. 21-22. Also see Ottley, B. L., " Legal Control of Foreign Investment in PNG ", (1976) 4 M. L. J. 2 pp. 147 - 183 for a discussion on the eight aims of the Government.

Guineans deny that such land has ever existed in PNG society. According to Papua New Guineans all land in the country has always been owned by the people and that no land has ever been known as ownerless or "no man's" land; they thus view the alienation of it as a grave injustice.

CHAPTER THREE

COMPULSORY ACQUISITION OF LAND IN POST - INDEPENDENCE PNG.

INTRODUCTION.

It has always been necessary for governments anywhere to own or acquire land by agreement or compulsory acquisition, if necessary, in order to carry out their development objectives. The successive post - Independence Governments (herein also the National Government) of PNG are no exception. Like their predecessors during the colonial period, the successive post - Independence Governments need land if they are to carry out development programmes effectively and efficiently. The Governments have, however, been mindful of the abuse of power on the part of the Colonial Administration which led to shortage of land in many parts of the country and the domination of the country's economy, especially plantation economy by expatriates. The successive Post - Independence Governments have not only been concerned with the problems of land shortage of their people and the domination of plantation economy by foreigners. They have also been concerned with the fact that these problems have led to increasing resentment among nationals which has been demonstrated by hostile reactions against foreign property owners. This resentment is further kindled by the strongly held view, as discussed elsewhere in this work, that many of the acquisitions carried out during the Colonial Administration were unjust.¹

1. See Papua New Guinea's Proposals to Australia for a Joint Scheme for Settlement of Alienated Land Problems, a classified (" Secret ") document, Port Moresby, 1974

Accordingly, the criteria used by the successive post - Independence Governments to determine the amount of land the State should own in PNG today is said to be one of "necessity" viewed in the context of public purpose and not one of "desirability".²

In order to tackle the land shortage and other problems associated with alienated lands outlined above and to prevent the perpetuation of the status quo on land rights of Papua New Guineans, several new measures have been instituted since independence. Amongst the most notable measures taken are two new schemes. The first was to compulsorily acquire and redistribute alienated lands owned by foreigners to land short citizens.³ The second scheme was to return or redistribute unutilised State lands to original owners or to land short citizens generally with a view to dealing with land shortages in the country. More significantly, the land rights of Papua New Guineans are authoritatively protected in the Constitution of the Independent State of PNG. In the post - Independence era compulsory acquisition is thus governed strictly by constitutional provisions.

p. 1. See also Fingleton, J. S., "Land Policy in PNG" in Weisbrot, D., Paliwala, A. and Sawyerr, A. (ed.) Law and Social Change in PNG, Butterworths, Sydney, 1982 pp. 105 - 125 at pp. 110 - 115; The CILM Report, op. cit., Ch. 4.

2. James, R. W., Land Tenure in Papua New Guinea, op. cit., p. 65.

3. At least one post - Independence Government appears to consider this scheme as an unnecessary public expenditure. It abolished it and the Alienated Land Redistribution Branch of the Lands Department which administered the scheme but it was re - instituted by another post - Independence Government subsequently. See further discussions on pp. 70 - 71 of this chapter.

CONSTITUTIONAL CONSTRAINTS ON COMPULSORY ACQUISITION.

As mentioned above, the Independent Constitution of PNG, S.53, protects land rights as an integral part of the basic human rights provisions of the citizens. The relevant part of S. 53 reads :

...[P]ossession may not be compulsorily taken of any property, and no interest or right over property may be compulsorily acquired except ... in certain defined circumstances.

The provision of S.53, as part of the individual's fundamental rights and freedoms, operate, *inter alia*, as legal restrains on the power of the Government of the day to expropriate property, especially land.

There are several reasons why property rights of citizens were protected in the Constitution of the country. Among other things, most Papua New Guineans still own much of the land in the country. The protection of these rights in the Constitution was regarded by many people throughout the country as a matter of high priority.⁴ Another reason is that if the property rights are contained in an ordinary legislation like the Human Rights Act 1971,⁵ the possible danger is that they can be easily changed in the normal way (by a simple majority votes) as any ordinary legislation at anytime by the Government of the day to suit its own interest. On the contrary, if they are

⁴ See the CPC Report, Ch. 5.

⁵ Protection of Property Rights was one of the 11 basic human rights previously contained in the 1971 Act.

incorporated in the Constitution it would be difficult for the Government to change and therefore ought to be better protected.⁶ The decision to incorporate property rights in the Constitution was a direct consequence of the experience people had during the days of colonialism. As discussed in Chapter 2, during the Colonial Administration the Administration alienated a lot of occupied lands through waste and vacant or ownerless declarations and other forms of forcible acquisitions which led to shortage of land in many part of the country. The decision to accord constitutional protection to the land rights of the people was necessary to prevent the repetition of those abuses.

Property Rights of Citizens.

The protection of property interests in the Constitution is accorded to all citizens - automatic and non - automatic citizens.⁷ Non - automatic citizens, however, are denied this protection for five years as from the date of independence. That is, their property rights were not protected under S. 55 of the Constitution within the first five years after

6. The CPC Report, op. cit., Ch. 5.

7. According to S. 65 of the Constitution of PNG an automatic citizen is " a person born in the country before Independence Day who has two grandparents born in the country or an adjacent areas...". He or she is also a person born outside of PNG prior to Independence Day but has two grandparents born in the country and who has renounced any other citizenship and has been registered as a citizen of PNG. " Adjacent area " means the Solomon Islands, Irian Jaya and the Torres Straits Islands. A non - automatic citizen is a person who has become a citizen of PNG other than as defined in S. 65; that is to say, a person who has become a citizen by " descent " under S. 66 or by " naturalization " under S. 67 of the Constitution. For further information see Part IV of the Constitution of PNG.

independence. However, during this period the property interests of such persons were protected in the same way as non - citizens.⁸ The distinction between different classes of citizens appears to conflict with the principle of equality between citizens as called for by the National Goals and Directive Principles.⁹ The substantive provision on equality of citizens is contained in S. 55 of the Constitution which espouses the principle of right of citizens irrespective of race, tribe and place of origin, among other things. But the distinction could be rationalized on the basis that without it or if there was only one class of citizens, the Constitution would institutionalise the exploitation of the indigenous or automatic citizens by non - indigenous citizens who were the beneficiaries of the colonial rule. If the land rights of automatic citizens are to be truly protected then that distinction is justified by the need to redress the economic and social imbalance caused by the colonial system. The limiting of the protection of property interests to automatic citizens for five years from independence day mentioned above is in accord with that need. It was to enable the successive post - Independence Governments of the day to complete the plantation redistribution programme and implement other land reform proposals of the National Government.¹⁰ It could be argued that S. 55 of the Constitution is a qualified right and that the equality of citizens guaranteed by that section is subject to the making of any laws for the special benefit or advancement of under - privileged or less advanced groups in the country. This

8. S.68(4) of the Constitution of PNG.

9. Goal 2, pp. 2-3 of the Constitution.

10. See James, R. W., Land Tenure in Papua New Guinea, op. cit., pp. 125 - 126.

includes the enactment of discriminatory legislations against any category of citizens for the purpose of giving an advantage or a special assistance to indigenous citizens.¹¹

Property Rights of Non - Citizens.

In contrast, non - citizens do not enjoy a special constitutional property protection,¹² and are further prohibited from acquiring freehold interests in land.¹³ These constitutional provisions are a direct consequence of the statements of the National Goals and Directive Principles enshrined in the Constitution which call for national sovereignty and self reliance¹⁴ and are based upon the recommendations of the Constitutional Planning Committee (CPC) that constitutional property protection should be restricted only to citizens.¹⁵ The argument for this restriction was based upon sympathy with the CILM recommendations as to the need for the reacquisition and redistribution to Papua New Guineans of expatriate - owned lands in accordance with

11. SS. 55(2); 68 (5); (6) and 38(1) of the Constitution of PNG. Discriminatory legislation in this instance, however, can only be enacted within 10 years after Independence, S. 68 (5) of the Constitution. See also *ibid.*, Ch. 8 for further discussions on this subject.

12. S. 53 (7) of the Constitution.

13. S. 56 of the Constitution.

14. Goal 3 of the National Goals and Directive Principles on pp. 3 - 4.

15. See the CPC Report, *op. cit.*, Ch. 5.

the Government's plantation acquisition scheme; and the conversion of freeholds and perpetual estates of non - citizens into Government leases.¹⁶

Both the CILM and CPC nevertheless agreed that property rights of non - citizens should be protected by ordinary legislation. In the case of the CPC, it recommended the protection of such interests by legislation, agreement between the Government and property owners, or by a general law concerning a certain type of property.¹⁷ This recommendation is reflected in the provision of S. 53(7) of the Constitution especially the later part of that provision, which provides that " the power to compulsorily take possession of, or to acquire an interest in, or right over the property of any such person" (meaning a non - citizen) " shall be as provided for by an Act of the Parliament ". The basic aim of this is to give the Government of the day sufficient flexibility to deal with the acquisition of foreign - owned property and payment for it in an appropriate way in order to deal with the land shortage and other problems associated with land alienation during the colonial period. If the Constitution gives equal protection to citizens and non - citizens, this will have limited the ability of the Government of the day to acquire foreign - owned property and redistribute it to citizens in accordance with its plantation acquisition programme. This will in turn have restricted the ability of the Government of the day " to carry out programmes designed to achieve a fairer distribution of the resources and of the benefits obtained from their use ".¹⁸

16. The CILM Report, Ch. 4.

17. The CPC Report, op. cit., p. 5/1/15.

18. Ibid., p. 5/1/14

Two important pieces of legislation which protect the property interest of non - citizens are the National Investment and Development Act 1974 and the Lands Acquisition Act chapter 192. The former Act generally protects foreign investments or enterprises operating in PNG. It guarantees foreign investors that there will be no nationalization or expropriation of their property except in accordance with law, for a public purpose defined by law. It further guarantees them the right to remit overseas all compensation payable upon nationalization or expropriation of property rights.¹⁹ The latter Act specifically affects alienated land. It expressly guarantees that in the event of any compulsory taking of land by the Government, compensation must be paid to the dispossessed owner in accordance with the principles of compensation set out under the Act.²⁰ Thus, although non - citizens property interests are not accorded constitutional protection, there are sufficient provisions made in ordinary legislation which guarantee their protection.²¹

19. See Schedule 5 of the Act.

20. See S. 18 of the Act for principles of compensation.

21. Apart from steps taken legislatively such as those under the above two enactments, a further measure was instituted under the Plantation Redistribution Scheme to protect the property interest of non - national. The measure was that the Australian Government was approached by PNG under the scheme to cover the difference between what foreign plantation owners could reasonably expect to get and what Papua New Guineans acquiring the property could reasonably be expected to pay. This would avoid damage to Papua New Guinea's international image to the detriments of investment and aid initiatives. However, it has been noted that insufficient funds were made available to implement the scheme at the level initially intended. See Fingleton, J. S., op. cit., (footnote 1) pp. 110 - 115.

Qualifications on Property Rights of Citizens under S. 53 of the Constitution.

The protection of property rights of citizens in S.53 of the Constitution is not unlimited or absolute. Indeed the rights in S.53, like all other fundamental rights and freedoms except the right to freedom from inhuman treatment, are subject to some qualifications. The qualifications are that compulsory acquisition is permitted under S. 53 if it is for (1) " a public purpose or " (2) " a reason that is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, that is so declared and [defined] in an Organic Law or an Act of the Parliament ".²² In addition, S.53 permits acquisition in situations where " the necessity for the [compulsory] acquisition ... is such as to afford reasonable justification for the causing of any resultant hardship to" the dispossessed owners. The protection of property rights of citizens guaranteed by S.53 in a form of a special right of citizens must, therefore, on occasions yield to the wide national interests in the acquisition of land for public purposes.

The qualifications on property rights of citizens are the result of the CPC recommendations that provisions be made to allow the Governments to acquire land by compulsory process in limited cases to meet development objectives. Unqualified property safeguards would have detrimental effects on the Government's power of

22. S. 53(1)(a) of the Constitution.

compulsory acquisition; without such safeguards, the Governments would be obliged to pay very substantial sums, on strict market conditions, as compensation for the land acquired out of the State's limited resources. This will in turn restrict the ability of the Governments to carry out programmes designed to achieve a fairer distribution of the resources in accordance with Goal 2 of the National Goals and Directive Principles of the Constitution.²³

The purposes which will satisfy the criteria of public purposes or a reason that is reasonably justifiable in a democratic society are provided in S.38 of the Constitution. These purposes include those connected with the defence of the country, public safety, order, welfare, health services, protection of persons under legal or practical disability, the development of under privileged or less advanced groups or areas, or the protection of the rights and freedoms of other individuals.²⁴ Thus, for one or more of the above purposes, the Government of the day can compulsorily acquire land under S.53 of the Constitution. In other words, the rights in S.53 can be restricted or regulated to the extent necessary to give effect to one or more of the matters of overall national importance specified in S.38 of the Constitution.

Any acquisition contrary to the provision of S. 38 would be unconstitutional and

23. See the CPC Report, op. cit., p. 5/1/14.

24. S. 38 (1) (a). Also see Chalmers, D., op. cit., p. 93; James, R. W., Land Tenure in Papua New Guinea, op. cit., p. 62. A comprehensive definition of public purposes is provided in S. 1 of the Land Act Ch. 185 which has been cited in Chapter 5 below.

therefore invalid and ineffective.²⁵ It could be argued, however, that strictly the Government has an inherent power to expropriate land for any purposes other than for a public purpose or a reason that is reasonably justified in a democratic society. An example of a situation where the Government can exercise its inherent power to take land is if there is a constitutional change in the country which seeks to place ownership of all the land in the Government. On the other hand, it could be argued that the Government elected by the people which is committed to resolving problems associated with land in the country as one of its major priorities, will have recourse to such an extreme measure against the people. Under normal circumstances the Government is therefore bound to exercise compulsory acquisition power only under the circumstances permitted by the Constitution. The circumstances which permit compulsory acquisition of land referred to above " are defined in terms of national interests which include the promotion of the welfare of the nation and the resolution of longstanding disputes between the State and local groups ".²⁶

Compulsory Acquisition of Property Deprives a Person of Ownership; Not Possession.

It should be noted that compulsory acquisition depriving a person of his property protected by S.53 refers to deprivation of ownership; not a mere possession. This

25. See S. 11 of the Constitution of PNG.

26. James, R. W., op. cit., p. 115.

proposition is well illustrated by the decision in png Ready Mixed Concrete Pty Limited v. The Independent State of Papua New Guinea and Others.²⁷ In that case the applicant company was granted a Government lease for a maximum period of 99 years in 1981. Prior to the grant, squatters occupied the land between 1969 and 1976. In the proceedings by the applicant company seeking to obtain immediate vacant possession of the land against all other persons, it was contested on behalf of the squatters that any order made by the Court which has the effect of depriving the occupants of their right to possession amounts to a compulsory taking of property under S.53 of the Constitution and the Protective requirements of that section have not been met. It was held, however, that an order which has the effect of depriving the occupants of their right to possession does not amount to a compulsory taking of property under S.53 of the Constitution, and is not therefore prohibited under that section. The Court further held:

A person is not deprived of property unless he is stripped of something to which he is entitled. The judgement of a Court which determines that a person's claim to be entitled to possession is not recognized at law or is recognized only to a limited extent (for instance until the happening of some supervening event such as a contrary claim by someone with a better right) does not deprive a person of that interest.²⁸

Compulsory acquisition of property referred to under S.53 includes any " forfeiture, extinction or determination of any right of interest in property ".²⁹ However,

27. [1981] P.N.G.L.R. 396.

28. Ibid., at p. 409.

29. S. 53 (4) of the Constitution.

determination of pre - existing rights by the Court does not amount to forfeiture, extinction or determination. For instance, in png Ready Mixed Concrete Pty Limited case it was argued that an order of the court having the effect of determining the right of the occupants to be in possession of the land is a compulsory forfeiture, extinction or determination of a right or interest in property held by citizens and is prohibited by S.53. The Court, however, was of the opinion that the word " compulsory " under S.53 of the Constitution implies the exercise of some power conferred by statute on the State or an instrumentality of the State, not the Court. S.53 is, therefore, not directed at the decision of a Court which adjudicates, declares or determines pre - existing rights.³⁰

As mentioned above, any acquisition or restriction on property rights in S.53 of the Constitution must not only satisfy the criteria of public purposes but also satisfy the criteria of being " reasonably justifiable in a democratic society " having a proper regard for the rights and dignity of mankind.³¹ The phrase " reasonably justifiable in a democratic society " is described as " the permissible extent to which wider social interests may restrict the seemingly absolute individual interest ".³² What then is meant by that phrase? According to Chalmers the meaning of the phrase " reasonably justifiable in a democratic society " is ambiguous and any attempt to apply it will give

30. Op. cit., at p. 409

31. For more detailed discussions and the definition of the phrase " reasonably justifiable in a democratic society," see Chalmers, D., op. cit., pp. 92 - 102.

32. Ibid., p. 93.

se to many problems.³³ While agreeing that the phrase presents judges with difficult problems of interpretation and application, the CPC seems to suggest that the Courts in PNG should find less difficult. This is because by using the word "justifiable" rather than "necessary" or "required", it provides the flexibility necessary for the Courts to decide whether a particular action taken by the legislature or executive is reasonably justifiable in the circumstances rather than deciding what they think the legislature or executive should or ought to have acted in a particular situation. Our Courts can also seek assistance from interpretations given to the phrase by Courts in other jurisdictions whose legal system is similar to that of PNG when called upon to decide whether a particular law or action is reasonably justifiable in a democratic society.³⁴

The question whether an act or a proposed act is reasonably justifiable in a democratic society is to be determined in the light of the circumstances obtaining at the time when the decision on the question is made.³⁵ To assist them in reaching a decision as to whether an act or a proposed act is reasonably justifiable it is desirable for the Courts to invoke the National Goals and Directive Principles of the Constitution which could be interpreted as representing national aspirations.³⁶ The National Goals and Directive

33. Ibid.

34. The CPC Report, op. cit., p. 5/1/6.

35. S. 39 of the Constitution.

36. See Chalmers, D., op. cit., pp. 100 - 101 where the author has drawn up some examples of the situations where the courts of PNG could take the National Goals and Directive Principles into account to decide whether an act restricting or

Principles could provide additional assistance to the Courts when weighing the claims of the individual against that of the society generally. In addition to invoking the National Goals and Directive Principles, the Courts may have recourse to, *inter alia*, the provisions of the Constitution of PNG, the United Nations Charter, the laws, practices and judicial decisions of the national courts or courts of any other country which has a similar legal system as PNG, the CPC Report and to any other materials the courts considers relevant.³⁷ In addition to the requirements that acquisition of property by compulsory process must be for a public purpose or for a reason that is reasonably justifiable in a democratic society, the reason for the taking of the property must be such as to justify any hardship which may have been caused to the owners of the property thereof acquired.³⁸

Finally, any restriction or regulation concerning property rights of citizens in S.53 can only be valid under an enactment passed in accordance with the requirements of S.38(2) of the Constitution. That is to say, the law purporting to restrict or regulate the rights in S.53 must firstly, be for the purposes of restricting or regulating guaranteed rights, secondly, it must specify the particular right that is being restricted or regulated. Thirdly, it must be made by the National Parliament and certified by the Speaker of the

regulating some fundamental right of an individual is reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind.

³⁷ See S. 39 (3) of the PNG Constitution.

³⁸. See S. 53 (1) (b) of the Constitution.

Parliament under S.110 of the Constitution to have been duly made. Unless the enactment of the law is for a reason that is reasonably justifiable in a democratic society, any such law must be effective only during state of emergency.³⁹ This is an important safeguard against executive abuse of the fundamental rights of individuals. Furthermore, any law that is enacted to regulate or restrict the fundamental rights and freedoms of individuals in the public interest or in accordance with the general qualifications on fundamental rights and freedoms in S.38 of the Constitution is presumed to be constitutional and to have been passed in the reasonably justifiable interest of the society. The burden is on those who allege otherwise to establish to the contrary that the regulation or restriction was not necessary in the public interest or was out of proportion to the object it sought to achieve.⁴⁰ In the circumstances where compulsory acquisition is permitted, the dispossessed owner of the land acquired is entitled to claim compensation from the Government. By S.53(2), he is entitled to "just compensation" calculated on "just terms" by the expropriating authority.⁴¹

Expropriating Authority.

Who is the expropriating authority referred to in S.53(2) of the Constitution? Again in

39. Such a law must be passed by three - fifths majority of the total members of the National Parliament. The CPC Report, op. cit., Ch. 5, para. 28. Also see Chalmers, D., op. cit., p. 102.

40. See Chalmers, D., *ibid.*, especially the discussions of cases, pp. 94 - 99.

41. See Frame v. The Minister for Lands, Surveys and Environment [1979] P.N.G.L.R. 626, for the definition of "just terms" under S. 53 (2) of the Constitution. In that case

ong Ready Mixed Concrete Pty Limited,⁴² Miles, J. when considering S.53(2) which provides for just compensation to be made by the expropriating authority, held that the applicant company in that case was not in any way an authority and its action to enforce its right to possession cannot be characterized as an act of expropriation. In short the company is not an expropriating authority referred to in S.53(2) of the Constitution. As such the company's assertion of its right to possession is not a compulsory taking of possession. Thus, as mentioned above, the expropriating authority in this instance must be the State or an instrumentality of the State which exercises some statutory power for the purposes of S.53(2).

REDISTRIBUTION OF PLANTATION LANDS SCHEME

One of the schemes adopted to help resolve problems of land shortage and redress economic imbalance between indigenous people and foreigners in the country caused by land alienation during the colonial era is the plantation lands redistribution scheme. This scheme enables successive post - Independence Governments to acquire alienated lands, especially plantation lands owned by foreigners and redistribute them to indigenous Papua New Guineans who are short of land. In order to deal with the

Raine, A. C. J., when applying the principle expounded in the Australian Case of Johnson Fear and Kingham v. The Commonwealth (1943) 67 C.L.R. 314 at p. 323, held that "just terms" in S. 53 (2) of the Constitution "involves full and adequate compensation for the compulsory acquisition of property". At p. 634. The question of compensation for compulsory acquisition in S. 53 (2) of the Constitution is dealt with in detail in Chapter 6.

⁴². Op. cit.

problems associated with alienated lands, the first national government of Chief Minister Michael Somare established the Commission of Inquiry into Land Matters (CILM) in 1973 to investigate the problems relating to land and recommend to the Government effective means of resolving them. One of the Commission's recommendations, after the investigations, was that the successive post-independence Governments of PNG should acquire and redistribute plantation lands, owned by expatriates to Papua New Guineans in areas where there is serious land shortage for subsistence gardening and/or economic development.⁴³

Following this recommendation the Government of Chief Minister Somare made certain policy decisions in 1974. It was decided that transfer of existing plantations to expatriates should not be permitted. However, two exceptions have been made to allow the transfer of plantation lands to expatriate interests:

- i) where there are special circumstances making joint venture arrangements desirable with substantial equity for Papua New Guinea interests, with provision for training and increasing equity over a period until the venture is wholly owned by Papua New Guineans; or
- ii) where there are overriding national or district interests which justify a sale; such as the importation of new technology, rapid exploitation of new markets, or any other special considerations which cannot be met from Papua New Guinean resources.⁴⁴

⁴³. See generally, Ch. 4 of the CILM Report.

⁴⁴. See Papua New Guinea's Proposals to Australia for a Joint Scheme for Settlement of Alienated Land Problems, op. cit., p.2.

he Government's decision in this instance was aimed at implementing the first and the fifth articles of the Eight Point Improvement Plan of the Somare Government.⁴⁵ The aims were directed at securing economic self - reliance for PNG with emphasis on small - scale rural based ventures with maximum participation by Papua New Guineans. The localization of plantations was in accordance with the social and economic objectives of the successive post - Independence Governments and reflected their confidence in the ability of Papua New Guineans to develop the capacity to manage cash - crops without too much reliance on foreign capital and expertise.

In June 1974 the Somare Government also approved a Plantation (Alienated Lands) Acquisition Scheme, aimed at localising all expatriate plantations and those owned by bodies originally of expatriate origin. However, exceptions were made of tea plantations, and nucleus palm oil and cattle estates because of the fact that they were new and heavily capitalized industries.⁴⁶ The Government decided that in areas of serious land shortage such as the Gazelle Peninsula and the Duke of York Islands in the East New Britain Province the plantations should be acquired outright in order to deal with the land shortage situation. Since the pressure on alienated land are greatest in areas of serious land shortage, alienated lands in these areas will be recovered for redistribution as soon as possible. The resolution of land shortage problem in the

45. See generally the CPC Report, op. cit., pp. 2/1 - 2/2, which sets out the eight aims of the Government.

46. Papua New Guinea's Proposals to Australia for a Joint Scheme for Settlement of Alienated Land Problems, op. cit., p. 2. Fingleton, J. S., op. cit., pp. 111 - 115.

country is one of the first priorities of the successive post - Independence Governments.⁴⁷ However, those who are in need of land and seeking the recovery of plantation land must take the initiative by approaching the Government for assistance. If the people are indeed in need of land, the Government will assist them to recover the plantation land.

In areas where there is no serious land shortage, however, the Somare Government's decision was that acquisition or localisation should generally proceed gradually by the recovery of equity in the plantations until they are taken over and controlled by Papua New Guineans. This decision will ensure an equitable spread or distribution of financial and manpower resources throughout different areas of the country and is in accordance with the successive post - Independence Governments' general political, social and economic guidelines.⁴⁸ The Government will also assist people who are not short of land but living near the plantations to acquire the plantation lands if they show that they are well organised and have raised some money on their own for the purchase of shares in the plantations.⁴⁹

47. Ibid., p. 3.

48. These general guidelines are contained in the National Goals and Directive Principles of the PNG Constitution, pp. 2-5.

49. Usually people are required to raise about ten percent (10 %) of the total value of the property in question for the purpose of deposit on the plantation. A good example is afforded by the people in Bainings and Kerevat areas of the East New Britain Province and in Mount Hagen area of the Western Highlands Province where the people concerned were not short of land but were well organised and had raised some money of their own before seeking Government assistance. The

in order to give effect to the scheme under discussions the Government in 1974 enacted four pieces of legislation. They are, the Lands Acquisition Act, the Land Redistribution Act, the Land Groups Act and the Land Trespass Act of 1974.⁵⁰ The Lands Acquisition Act was designed to facilitate the acquisition of alienated lands, by agreement where possible or by compulsory where necessary, for the purposes of making it available to Papua New Guineans who are short of land for subsistence farming or for engaging in economic development or for the resettlement of urban dwellers, and for other related purposes.⁵¹ Generally the Government in this case wants to acquire land it requires, in so far as possible, by agreement with the power of compulsory acquisition being held in reserve for use only as a last resort as it usually causes ill - feelings. The Act affects alienated lands in any areas irrespective of whether or not there is a land shortage.⁵²

aim of acquiring plantation land by people in areas not affected by land shortage appears to be mainly for economic development. However, it would seem that aims of acquiring the Wurup and Alimp plantations in Mount Hagen were much more than economic. Their " aims were essentially to be economically self - sufficient, to be an example of national unity whereby different clans and tribes work together in nation - building to exercise social control through group solidarity, and to serve as a foundation for further development at grassroots level ". See Kaipu, J., op. cit., pp.69-77.59; Mark, T., " Acquisition and Redistribution of Alienated Land: A Study in Access " (1975) 2 Yagl - Ambu 1 pp. 65 - 70.

50. The first two Acts are cited in this work as the Lands Acquisition Act Ch. 192 and the Land Redistribution Act Ch. 190.

51. The purposes of the Act are set out in S.1 of the Act.

52. See Papua New Guinea's Proposals to Australia for a Joint Scheme for Settlement of Alienated Land Problems, op. cit., p. 5.

The Land Redistribution Act was designed to provide fair redistribution of lands in accordance with people's need.⁵³ It provides for the establishment of a distribution authority whose primary function it is to reach a permanent effective agreement among the parties concerned about the method of redistribution.⁵⁴ The basic aim of the and Groups Act was to provide for the incorporation of customary and similar groups, and to allow them to acquire, hold, manage and deal with plantation lands in their own customary names.⁵⁵ This Act, however, does not tell people who are to acquire plantation lands about how to form a group. They must do this in accordance with their own custom. Finally, the Land Trespass Act was enacted to prevent speculation on and intended for acquisition or redistribution. It gives the Government power to stop people from going on to land that is not yet acquired or to which they are not yet permitted to go.⁵⁶ Generally, therefore, the aims of these series of enactments were to enable the Government to acquire and redistribute alienated lands in a smooth and orderly fashion.

As noted earlier the scheme adopted by the Government in this case was directly based upon the CILM recommendations. The Commission in its report noted that there was an urgent need to introduce a programme of systematic buying back of plantation

53. S. 1 of the Act.

54. S. 12 of the Act.

55. See S. 1 of the Act.

56. See S. 1 of the Act.

lands where necessary, particularly in areas where large - scale alienation had taken place. Apparently this is because many groups in these areas are acutely short of land even for subsistence farming and/or deeply aggrieved at the way in which their land was initially acquired by the Colonial Administration as discussed in the last chapter. Attempts by these groups to recover their lands through official and legal processes had not been very successful.⁵⁷ It has been reported that currently there are some sixty instances of properties being illegally occupied, either fully or partially and about forty properties are being threatened with occupation by people who were traditional owners of the lands on which the plantations were established.⁵⁸ Consequently the Commission recommended compulsory acquisition of some alienated lands, particularly plantation lands held by expatriates, and their redistribution to the descendants of the original owners who are victims of land shortage. In cases where, *inter alia*, the original owners and/or their descendants already have ample land to the people who need them in land short areas.⁵⁹

The implementation of the Plantation Redistribution Scheme of the Government in this case entails two aspects. Firstly, the acquisition of expatriate - owned plantation lands for landshort Papua New Guineans living on or near the land for the purposes of

57. See generally the CILM Report, op. cit., Ch. 4.

58. See Attachment B of the Papua New Guinea's Proposals to Australia for a Joint Scheme for Settlement of Alienated Land Problems, op. cit., (Footnote 1).

59. See the CILM Report, op. cit., Ch. 4.

subsistence gardening and/or economic development, and secondly, the eventual localisation of all expatriate - owned plantations. It could be argued, however, that it is not necessary to recover all alienated land from expatriate hands because of the fact that most villagers will apparently have neither the capital necessary to acquire the land nor the management capabilities to maintain the plantations.⁶⁰ However, it is important that the land needs of Papua New Guineans must be properly met. It is also necessary to stop the system that has allowed a small number of expatriates to acquire title to large areas of some of the best land and leave much of it undeveloped. The CILM has issued a general warning that although alienated lands may be recovered for landshort nationals, care must be taken that it does not lead to too much private ownership based on ancient claims against the PNG Government.⁶¹ For this reason the Government should retain or acquire title to land for public purposes and for leasing to those who have greater need for it and would use it. This is so as to avoid creating a situation whereby many Papua New Guinean individuals and groups will become landlords and that colonial exploitation will be replaced by exploitation of one class of Papua New Guineans by another.⁶²

60. It must be noted that under the scheme people who acquire the land the subject of the redistribution are normally required to repay the purchase price of the land to the Government. See S.8 of the Land Redistribution Act. See also the Department of Lands and Surveys, Annual Report and Statement, Port Moresby, 1983 pp. 42 - 44.

61. See the CILM Report, op. cit., Ch. 2.

62. Ibid.

Finally, as seen above, the Government's plantation redistribution scheme aims to eventually localise all plantation lands, with the current exceptions of nuclues tea, oilpalm and cattle estates. However, despite the fact that the Government is committed to this scheme in order to solve the present land shortage problems of its nationals, the scheme has problems. For instance, if all plantations were transferred to Papua New Guineans, land productivity might fall. This is because most of the recipients of the plantations might not have the management skills to effectively and efficiently maintain the productivity of the plantations. The decline in output would reduce the national income and could impair the balance of payments of the country.

To counter these problems, the successive Governments have incorporated in the scheme a number of features designed to minimise any decline in production of the plantations transferred to indigenous operators. Firstly, except in cases of serious land shortage, the Government does not transfer the plantations until the people concerned have organised and incorporated themselves as business entities in accordance with the Land Groups Act to acquire, hold, manage and generally deal with the plantation lands. Secondly, the Government withholds any transfer of interests under the scheme until the questions of the purchase price for those interests and the Government's repayment terms have been accepted by the people concerned. For instance, usually the Government requires the people to pay fifty percent (50%) of the purchase price before it can issue them with leases.⁶³ Thirdly, the Government

63. Department of Lands and Surveys, Annual Report and Statement, op. cit., p. 43.

Withholds any transfer of ownership in the plantation lands until payment in full has been made. It is anticipated that as the prospect of recovering ownership and title has been the greatest attraction to people in many parts of the country, such an approach will greatly induce them to maintain production and finalise repayments.⁶⁴

Another possible impact of the plantation redistribution scheme is that it might discourage expatriate owners from maintaining their plantations at productive level until take - over or acquisition takes place, if they are unsure about the future of their plantations. A feature designed to prevent this situation, however, is that valuation of plantations is to be calculated solely on the basis of remaining income - earning capacity of the property in question and not on the basis of market value. This is intended to indirectly get the expatriate owners to maintain their plantations at productive level until acquisition is effected. It is anticipated that this would have one of the greatest effects in gaining their co - operation.⁶⁵

A further possible impact of the scheme is that it would affect employment and income earning opportunities for people from remote areas. Usually a large percent of plantation labour is drawn from areas which are generally least developed such as the Highlands. Many of these labourers live on the plantation, sometimes with their

64. See Papua New Guinea's Proposals to Australia for a Joint Scheme for Settlement of Alienated Land Problems, op. cit., pp. 8 et. seq.

65. See Fingleton, J. S., op. cit., pp. 112 - 113.

families, for many years as casual employees after their initial contract expires. Where plantations are localised gradually by a share takeover, there might probably be little immediate displacement of plantation labour. However, where plantations are redistributed to people in areas of serious land shortage, it is likely that there would be some displacement of labour. When most of these displaced workers return to their respective areas they might not be able to find employment to support themselves and their families. Their right to cultivate customary land may well have been taken over by other members of their customary groups in their long absence. Generally this would broaden the existing gap between better off areas where plantations are located and less better off areas where there are no plantations. This would be inconsistent with Goal Two of the National Goals and Directive Principles of the PNG Constitution.⁶⁶

The good news, however, is that the Government is very determined to make every attempt to accommodate the interests of displaced plantation labourers in the redistribution programme. For instance, among other things, the Minister may declare that such persons are "people concerned" for the purposes of redistribution under S.7 of the Land Redistribution Act or alternatively he may reserve part of the land intended for redistribution for the purposes of resettlement of such persons.⁶⁷ If an attempt to accommodate the interests of the displaced labourers is not possible, then the only other option would be to return them to their original home area or resettle them

66. Goal 2 may be found on pp. 2-3 of the Constitution.

67. Papua New Guinea's Proposals to Australia for a Joint Scheme for Settlement of Alienated Land Problems, op. cit., p.11.

elsewhere. However, the former is possible in so far as there is no land pressure in the original home area of the labourers; if there is pressure on land then the latter appears to be an ideal alternative.

In addition, it is the policy of the Government to allocate more funds to develop less developed areas and less funds on the better developed areas in order to ensure maximum participation by the people in all areas of the country. It is expected that with the high priority which the Government places on development in the least developed areas under its Rural Improvement Programmes, the increased opportunities to earn income at home in labour intensive capital works projects will absorb a significant number of displaced plantation labourers.⁶⁸ This will prevent the disparity in incomes between nationals, but more importantly, it is in accord with the spirit of Goal Two of the Constitution which calls "for all citizens to have equal opportunity to participate in, and benefit from, the development of " the country. ⁶⁹

So far, since the incorporation of the scheme, about eighty four plantations have been acquired at a total cost of K7,239,504, out of which K4,668,306 is the total outstanding debts still owed to the Government.⁷⁰ Out of the eighty four plantations acquired under the scheme, thirty two plantations are said to be managed by the National Plantation

68. Ibid.

69. See pp. 2 - 3 of the Constitution.

70. Department of Lands and Surveys, Annual Report and Statement, op. cit. p.43.

Management Agency and thirty four of them are managed by business groups with assistance from the Alienated Land Redistribution Branch of the Department of Lands. The remaining eighteen of the plantations are now fully owned and operated by business groups.⁷¹

A Set - Back to Plantation Redistribution Scheme.

The plantation (alienated lands) redistribution scheme has suffered at least one major set - back since its inception. The scheme was abolished and retrenched or re - deployed the staff previously employed in the Alienated Land Redistribution Branch of the Lands Department by the Chan - Okuk Government in January 1982 as a cost - saving measure. However, it was re - instated in early November of the same year by the Somare Government when it returned to power after the June 1982 general election. The decision to re - instate the scheme was not an easy one to make in view of the overall Government policy to rationalise and thus reduce the size of the Public Service as a cost - saving exercise. The overriding reason, however, for the re - introduction of the scheme was that cost - saving in this case was purely short term, in as far as thirty four of the plantations managed by the business groups with assistance from the Alienated Land Redistribution Branch, still owed K1, 183, 949 in loans to the State. This amount remained uncollected since there was no alternative machinery established in place of the Alienated Land Redistribution Branch to collect the

71. Ibid.

ebts.⁷² It appears therefore that although the programme is an important step towards dealing with land shortage and other problems related to alienated lands in the country, at least one post - Independence Government has considered the scheme unnecessary and costly to public and that the country can do without it. Thus, it is true to say that not all successive post - Independence Governments view the scheme as significant in dealing with the country's land shortage problems.

Despite the above set - back the plantation redistribution scheme is an ideal opportunity for people to settle their land shortage problems and to build up a strong base for future development. They have been complaining about plantation lands for many years. As a result, this scheme has been introduced to return plantation lands in areas of extreme land shortage and also to localise the plantation industry. However, as one Field Redistribution Officer puts it, the success of this scheme depends largely on assistance and co - operation from the recipients of the plantation lands. This is because often there are a lot of disputes and unco-operativeness on the part of the recipients which make it difficult for Government officers who try to ensure a smooth and orderly transfer of the plantations.⁷³

⁷². Ibid., p. 42.

⁷³. See Kaipu, J., op. cit., p. 76.

REDISTRIBUTION OF UNUSED STATE LANDS ACQUIRED BY COMPULSORY ACQUISITION.

Another scheme adopted by the Government to deal with the problems of shortage of land in the country was to redistribute unutilised State lands acquired by compulsory process. This also follows the CILM recommendation that unused State lands be returned to the original customary owners or to people in land short areas.⁷⁴ It appears that the benefactors of this policy would not necessarily be the former traditional owners, especially in cases where the original owners already have ample land, though it may be the case in many instances. This is in conformity with Goal two of the National Goals and Directive Principles in the Constitution. Goal two requires that those people who experienced emotional and material disadvantages as a result of the loss of their customary land should be given an opportunity to gain a fair share of the social and economic development arising from the alienation of their lands. They ought, therefore, to have a claim to such lands.

However, it is doubtful as to how far this ideal is practicable when the group which is to get the subject land has had no historical connection with the land and the original owners are hostile to such an agreement. It is submitted that in such instances the constitutional precept would be best achieved by declaring such lands as national land required for resettlement of land short Papua New Guineans and reserving them for their use. Alternatively, a compromise arrangement may be sought whereby the

74. See the CILM Report, op. cit., Ch.4.

rights of the original customary owners and/or their descendants are recognised but provide for subsidiary rights of occupancy to be given to the land short people, for instance, a lease from the customary owners.⁷⁵

Where the Government decides to dispose of unused State lands acquired by compulsory process then it should take into account the principles of disposition in S. 18 of the current Land Act. S. 18 states that, if the Government proposes to dispose of the land acquired by compulsory process by way of a grant as a leasehold or freehold estate over the land rather than using it for some other public purposes within seven years of its acquisition thereof, regard must be had to the general principles expressed in that section. The principles of disposition in S. 18 have two aspects. First, S. 18 deals with disposition of lands previously acquired from non - customary owners. Second, it deals with disposition of lands previously acquired from customary owners.

(i) Disposition of Land Acquired from Non - Customary Owners.

The first aspect of disposition in S. 18 is that where the subject land was leasehold or freehold land prior to its acquisition and the Government proposes to grant a leasehold or freehold interest over the land it should give former owners the right of first refusal. The term "the former owner" in relation to land other than customary land

⁷⁵. See James, R. W., Land Tenure in Papua New Guinea, op. cit., Ch. 4. See also Papua New Guinea's Proposals to Australia for a Joint Settlement of Alienated Land Problems, op. cit., p. 11.

n this case is defined in S.18 as to mean:

- (a) where only one person had an interest in the land at the date of acquisition and that person is still alive, or in the case of a company or corporation in existence - that person; or
- (b) in any other cases - such person (if any) as the Minister in his absolute discretion, having regard to the interest that existed in the land at the date of acquisition, considers to be fairly entitled... to the land.

Where the land in question was a State lease granted by the National Government or Colonial Administration prior to its acquisition it should first be offered to the former lessee of the land under the State lease as such. Similarly, where the land proposed to be disposed of, prior to its acquisition, was a freehold land, it should first be offered to the original owner of that land. In the case of the Land Ordinance 1911, although there were provisions in those Ordinances for dispositions as leasehold or freehold, there were no provisions for the land to be first offered to the original owners or otherwise in similar circumstances.

Whether the land proposed to be disposed of should first be offered to the original owners or not will depend upon the circumstances of each case. For instance, the land cannot be offered to the former owners where the former owners have died since the acquisition of the land or where they cannot be located after due inquiry. Also, land cannot be offered to the original owners where substantial improvements have been made to the land since its acquisition.⁷⁶ Furthermore, where the subject land was

76. See Subsection (6) of S.18.

acquired prior to 26th September, 1963, being the commencement date of the pre-independence Land Ordinance 1962 it cannot be first offered to the original owners.⁷⁷ Finally, land cannot be offered to the former owners if they already have ample land.⁷⁸

A further exception, and perhaps the most important one, is that there is no strict rule that any land proposed to be disposed of must first be offered to the former owners. Thus, it can be disposed of without first offering to the former owners. It is assumed that in this case people who are experiencing land shortage will be the first ones to receive such lands. This exception recognises the principle that once the notice of acquisition is given the legal estate in the subject land is effectively vested in the State freed and discharged from all encumbrances.⁷⁹ The land can, therefore, be dealt with in all respects as any State lands if it is no longer required for a public purpose stated in the acquisition order or the purpose is not immediately available. For instance, it may be used for a public purpose other than that for which it was acquired initially including disposition to any Papua New Guineans in areas of extreme shortage of land. This again conforms with Goal two of the National Goals and Directive Principles of the Constitution of PNG which requires the resources of the country to be equitably distributed throughout the country.

77. See Subsection (8) of S.18.

78. James, R. W. , Land Tenure in Papua New Guinea, op. cit., p. 69. Also see generally the CILM Report, op. cit., Ch. 4.

79. See S.17 of the Land Act Ch. 185; S.7 of the Lands Acquisition Act Ch. 192.

ii) Disposition of Land Acquired from Customary Owners.

The other aspect of disposition in S.18 is that where the land proposed to be disposed of was initially acquired from a customary landowning group it should be declared to be customary land again and allowed to return to the former customary owners pursuant to S.76 of the present Land Act. Where land is declared under S.76, it is disposed of as customary land and not as a leasehold or freehold estate as mentioned above.

If the Government decides to hand back land which was previously acquired from customary owners, the provisions of S.76 of the Land Act come into play. S.76 provides for declaration of "any Government land or trust land ... to be customary and ". The effect of this declaration appears to indicate that the Government should divest itself of the ownership of the land and thereupon the land shall be deemed for all purposes to be customary land and subject to customary law. For the purposes of determining its ownership the land is to be deemed always to have been customary land. The CILM recommended in its report that if land which is acquired by compulsory process for a public purpose within ten years from the date of its acquisition then the land should revert to the original rightholders without any obligation on them to return the purchase price.⁸⁰ A more specific procedure to identify the original

⁸⁰. See the CILM Report, op. cit., Recommendation 54. cf. Urban land acquired by compulsory process cannot be returned to the original owners even if it is not being used within 10 years after the date of its acquisition. See p. 89 of the Report.

customary owners in the event of disposition or proposed disposition of unutilised state lands under S.76 can be found in the Land Redistribution Act. That Act applies, *inter alia*, to any land declared as customary land in accordance with S.76 of the Land Act.⁸¹

The provisions in the pre - 1962 acquisition statutes were inadequate. Although the enactments made provisions for disposition of land as freehold or leasehold, they did not make any provisions whatsoever on whether, *inter alia*, the subject land be first offered to the former owners if it was previously non - customary land or be declared to be customary land if it was previously customary land in the event of a disposition or proposed disposition on the part of the Government.

It seems that the land to be disposed of as customary land under S.76 is not simply confined to land acquired by compulsory process; it could be any Government lands. This is because the term " Government land or trust land " in S.76 implies that it does not necessarily have to be land acquired by compulsory process. That is to say, it could be any Government or trust lands generally which are not being used or required for any purposes at all. It may include land acquired by agreement, by declaration as Government land under S.75 of the Act or by confiscation. Chatterton categorised the land to be returned to include land acquired by waste and vacant or ownerless declarations, Government land which has since its acquisition remained unutilised either by the Government itself or by lessees to whom it has been leased

81. See S.5 of the Land Redistribution Act.

and land which has been acquired or resumed with compensation of developed land or redistribution to indigenous people in cases where land is in short supply.⁸²

The CILM Recommendation on Disposition of Land under S. 76.

The declaration under S.76 of the reserve lands is considered by the CILM as an unsatisfactory way to deal with the land for two reasons.⁸³ The first reason is that the land in question has already had a form of title (Government land) and as such it should be dealt with in any way. Secondly, it is unfair to people who cannot show traditional claims or rights in the reserved land but have settled on it. Accordingly, the CILM recommended that all reserves or reserve lands which have not been already relinquished by the Government be redistributed by lease or registered customary title among the people who live on or near them in order to protect the interests of these people.

With respect to disposition of land acquired by declaration as Government land under S.75 of the Land Act (or previously waste and vacant or ownerless), it could be argued that handing back of this land to customary claimants does not solve all the problems. One way of dealing with the land shortage situation is to hand all the undeveloped waste and vacant land back to the descendants of the traditional rightholders. In many

82. Chatterton, P., "The Historical Dimension" in Peter Sack (ed.), Problem of Choice: Land in Papua New Guinea's Future, op. cit., p. 14.

83. The CILM Report, op. cit., p. 60.

ases, especially where traditional rightholders have never stopped using the land, it could provide a simple and just solution. In other cases, however, attempts to return the land would invite serious disputes among various clans claiming to be the original owners, especially where traditional rightholders have stopped using the land after its acquisition. In such cases, what the CILM recommended, which I think is logical, is that where there are several claimants to land as in the case in many situations, all else being equal, preference be given to those who have little land and are in need of it, and those who will live on it and use it rather than leaving it idle.⁸⁴

A policy which is favoured by the CILM, as opposed to returning undeveloped waste and vacant or ownerless land to traditional rightholders or leasing it to settlers from other provinces, is to vest all such land in the Provincial Land Control Boards. This includes land granted in freehold and leasehold title which has not been developed. The Board would determine the needs of the villagers who live on or near the land, taking into account the population of the various settlements, the amount of other land they have, and their plans for using the land. It would then divide and distribute the land in accordance with the need of the people. If, however, the villagers do not accept the Board's decision or where the Board is satisfied that the needs of the villagers who live on or near the land are fully met the land could be leased to land - short settlers from inside or outside the Province.⁸⁵ Alternatively, it has been suggested that

⁸⁴. See *ibid.*, Ch. 2.

⁸⁵. See *ibid.*, pp. 65 - 66.

reserves be created on such lands for common use by all residents of a village or for community purposes or for use by an institution such as a school or church.⁸⁶ If the reserve is no longer used for the intended purposes or if the agreed period expires, the reserve land reverts to the respective owners - to the Government or to the customary owners as the case may be. This could be an alternative to returning the land to any particular group or person including original customary owners in S.76 of the Land Act.

Land previously acquired by compulsory process is not always declared under S.76 to be customary land again and return to the original customary owners if it is not required or immediately required for the purpose for which it was initially acquired or if it cannot be used for some other public purposes. As in the case of disposition or proposed disposition of land as leasehold or freehold discussed earlier whether land can be disposed of as customary land again under S.76 will also depend upon the circumstances of each case. It is unlikely, therefore, that land would be declared to be customary land under S.76 in the following circumstances. For instance, where the land and the subject of the disposition or proposed disposition since its acquisition,⁸⁷ was acquired prior to 26th September, 1963, being the date in which the pre -

86. See Crocombe, R. G., " The Niue Alternative " in Sack (ed.) Problem of Choice, op. cit., pp.75 - 86.

87. See Subsection (6) of S.18 of the Land Act.

independence Land Ordinance 1962 came into effect,⁸⁸ or where the original owners already have ample land,⁸⁹ or where the land in question was acquired in accordance with S.9 of the Land (Underdeveloped Freeholds) Act,⁹⁰ or where land initially acquired as urban land.⁹¹ In addition, the Government is not bound by the provision of S.18 and it can dispose of the land in any way or to whoever it sees fit; the fact that the subject land was originally acquired from customary owners notwithstanding.

Where any of the above circumstances prevail the Government, being not bound by the provisions of S.18, can dispose of the land to any individual or group other than the original owners. This may include naming a particular Papua New Guinean individual or group to be the owner or owners of that land and thereupon the individual or group so named shall be deemed conclusively for all purposes to be the owner or owners of the land by custom.⁹² In the absence of such a disposition, however, the land in question vests in the descendants of the original owners under the relevant customary tenure and the land shall be deemed always to have been customary land

88. See subsection (8) of S.18.

89. See James, R. W., Land Tenure in Papua New Guinea, op. cit., p. 69.

90. See S. 9 (5) of the Land (Underdeveloped Freeholds) Act which bars the application of S 18 which permits the declaration of land acquired by compulsory process to be customary land under S. 76.

91. See S.76 (3) of the Land Act.

92. See CILM Report, op. cit., p. 89.

or all purposes as stated earlier.

The disposition of land to individuals or groups other than customary owners in S.76 is in conformity with the CILM recommendation. The Commission recommended that the Government should adopt a policy where land should be given to those who need it and would use it. The Commission reasoned that both equality and development are best attained by giving the land to people who need it and will work it,⁹³ and is in accord with Goal two of the National Goals and Directive Principles of the PNG Constitution which requires the resources of the country to be distributed equally to all sections of the community for all citizens to have equal opportunities to participate in and benefit from the development of the country.⁹⁴ In pursuit of these policies the Government should return alienated land, in particular, unused Government land to people who are suffering from land shortage rather than declaring it under S.76 to be customary land. This is because alienated land is a national asset which can be used to increase production and national income. The holders of title to alienated land, therefore, must make good use of it or give way to those with greater need and ability to use it. This reason of public interest modifies a simple policy of returning unused Government lands to the descendants of traditional owners and would have the effect of promoting greater mobility and inter - group mixing among the people. This would in

93. This recommendation has been cited in Zorn, J., " Fighting Over Land " (1974) 4, M. L. J. 1, pp. 7 - 36 at 25.

94. See the Constitution of PNG, pp. 2 - 3.

urn foster a sense of belonging to the wider national community if people from different parts of the country are allowed to take up rights in unused Government lands.

Disposition of Land as Freehold or Leasehold.

Disposition of land other than to original owners may include disposition as freehold or leasehold land. Firstly, there appears to be no provision in the current legislation authorizing the Government to sell land as freehold. If the Government decides to dispose of the land as freehold, however, it will only have to be to citizens because the Constitution only allows citizens to acquire freehold interest in land.⁹⁵ The Constitution makes this right a special right of citizens and prevents non - citizens from acquiring new freehold.⁹⁶ The CILM recommended that all freeholds be converted into Government leases of 60 years for citizens and 40 years for non - citizens, and development conditions be imposed on the lessees.⁹⁷ However, the Constitution accords protection to freeholds held by citizens.⁹⁸ This represents a serious departure from the recommendation of the CILM.

⁹⁵. See S. 56 of the Constitution.

⁹⁶. S. 56

⁹⁷. See CILM Report, op. cit., pp. 52 - 59.

⁹⁸. See S. 53

The Land (Ownership of Freeholds) Act 1976 defines freehold ownership for purposes of the Constitution⁹⁹ and provides for their voluntary conversion into Government leases of 99 years. However, it has been proposed that under the new legislation to be introduced to amalgamate all existing land legislation, a provision will be inserted to allow for mandatory conversion of freehold land into leasehold land.¹⁰⁰

There is no provision for compensation to be paid to the lessee for loss of the freehold reversion which vests in the State absolutely,¹⁰¹ and is in line with the CILM recommendation.¹⁰² The CILM argued that a conversion of freeholds to Government leaseholds is no real deprivation of property. This assumption is questionable in law. However, as non - citizens have no constitutional property protection a conversion legislation which makes no provision for compensation is still a valid law and enforceable. This proposition appears to be supported by the Constitution which provides that a law that is made for the purpose of prohibiting or regulating certain interests held by non - citizens in relation to any land is valid.¹⁰³ Thus, the Land (Ownership of Freeholds) Act is a valid law and enforceable as it only seeks to regulate the interests of non - citizens in land.

99. S. 56 (2) (b) of the Constitution.

100. Department of Lands and Surveys, Annual Report and Statement, op. cit., p. 3.

101. See S. 24 of the Land (Ownership of Freeholds) Act 1976.

102. See Recommendation 22.

103. See S. 54 of the Constitution.

and may also be disposed of by lease as Government or State lease. A State lease is defined by the current Land Act as to mean " a lease from the State granted under or continued in force by this Act ".¹⁰⁴ The term lease itself is not defined in any Statute. It is implied, however, in the Land Act that a lease is a grant of land for a specified period not exceeding 99 years in consideration of the payment of rent. Although the payment of rent is an essential incident of the Government lease, no rent is payable upon the grant of a mission lease.¹⁰⁵

There have always been legislation in PNG providing for leases to be granted of Government lands.¹⁰⁶ The current Land Act empowers the Minister to grant State leases of any Government lands for various purposes.¹⁰⁷ For instance, the Minister may grant agricultural, cultural, pastoral, business and residential and mission leases or leases of Government owned buildings or special purposes and town subdivision leases.¹⁰⁸ The present Lands Acquisition Act vests additional power in the Minister to

104. S. 1 of the Land Act Ch. 185. The pre - Independence Land Act 1962, S. 38, used the term " Government lease " and defined it as " a lease from the Government granted or continued in force under the Land Act ".

105. S. 61 of the Land Act.

106. See Part V of the Crown Land Ordinance 1890 (Papua); Part VI of the Land Ordinance 1899 (Papua); SS. 24 - 31 of the Land Ordinance 1911 (Papua); Part IV of the Land Ordinance 1922 (New Guinea); Part VI of the current Land Act Ch. 185.

107. S. 27 of the Act.

108. See Divisions 2 - 8 of Part VI of the Land Act.

grant leases. The Minister's power to grant State leases includes land acquired under the Lands Acquisition Act.¹⁰⁹

CONCLUSION.

The alienation of land during the colonial era has caused difficult problems for PNG. It has not only resulted in serious land shortage in many parts of the country and the domination of the country's economy, particularly plantation economy, by foreigners which Papua New Guineans refused to tolerate. It has also created insecurity amongst customary land owners. These problems led the country to establish the CILM to investigate into problems associated with colonial land alienation faced by Papua New Guineans in the country and recommend possible ways of dealing with them. Based upon the CILM recommendations certain measures were instituted at independence with a view to redressing the problems in accordance with the overall social and economic objectives of the country. These measures include the protection of the land rights of Papua New Guineans in the Constitution of PNG, the Plantation Redistribution Scheme and the Unused State Land Redistribution Scheme as dealt with in this chapter.

¹⁰⁹. S. 11 of the Act.

CHAPTER FOUR

THE PROCEDURES FOR COMPULSORY ACQUISITION.

INTRODUCTION

Any decision of the Government to acquire land compulsorily must be based on proper considerations or it could be set aside for lack of bona fides.¹ If the Government has resolved to proceed with the acquisition, one of the requirements is that it must generally adhere to the normal procedures for compulsory acquisition of land. Usually the first step in the procedure is to issue a notice to treat, take or resume the land² or a development notice.³

This chapter examines the procedures for compulsory acquisition. It examines firstly, the purposes of a notice to treat or a development notice, secondly, the imposition of time - limits by acquisition statutes, thirdly, the discretionary power conferred on the Minister by acquisition statutes to exercise compulsory acquisition power and finally, the effect of the notice of acquisition.

1. J. D. & S. W. Mudge v. The Secretary for Lands and Others, National Court Judgement (Unreported) 1983.

2. The Land Act Ch. 185, S. 16; the Lands Acquisition Act Ch. 192, S. 8. Similar procedures can be found in pre-Independence legislation. For instance, the Land Ordinance 1911-40, S. 59; the Land Ordinance 1922-41, S. 70 provided for a notice of intended acquisition to be issued.

3. The Land (Underdeveloped Freeholds) Act Ch. 193, S. 3.

NOTICE TO TREAT OR DEVELOPMENT NOTICE.

A notice to treat is a notice of an intention to take or resume land. The main purpose of a notice to treat is to inform the landowners and other persons with an interest in the land where the Government exercises or intends to exercise its statutory power of compulsory acquisition and to invite them to deal with the Government. In general the significance of the notice to treat is that firstly, it gives parties a right to enter into a purchase agreement and determine the purchase price and compensation; secondly, it regulates the power of the Government to acquire private property by compulsory process; thirdly, it identifies the subject land and informs the landowner the procedure he is required to follow in order to negotiate with the Government with a view to selling his land or interest therein including a warning that failure to do so would result in the acquisition of his land; fourthly, that it may determine the date on which compensation for the value of the land is to be determined; and finally, that it may prevent the landowner from dealing with the subject land or creating new interests in it.⁴

The main purpose of a development notice, on the other hand, is to encourage owners of freehold land to develop their land in the best public interest. It identifies firstly, the subject land and informs the landowner of the procedure which he is

4. Brown, D., Land Acquisition, (2nd. ed.), Butterworths, Sydney, 1983 p.48.

required to follow in order to prepare a development scheme for his land together with his financial capacity and otherwise to effect the scheme to the Government. It also warns the landowner that if he fails to satisfy the Government as to how he proposes to develop his land together with his financial capacity, the Government will commence the statutory procedure to take the land. It further restrains the Government from exercising the power of compulsory acquisition prior to the period specified in the notice. Finally, it encourages not only the landowner in question, but also all other freehold owners to develop their land in the interest of the public. It is important to note, however, that before the land to which the development notice applies is taken, even if the owner failed to comply with the development notice, a further notice to 'show good cause' is required to be served on the landowner to show why the subject land should not be acquired.⁵ Thus, if there was a good cause for not acting in accordance with the conditions of the development notice on the part of the landowner it is important to give him extra time necessary to do so prior to the acquisition of his land.

If the landowner failed to act in accordance with the conditions of the notice to treat or the development notice and/or any subsequent notice thereof, it could be seen as a waiver of the right to do so on his part and the Government will invoke its compulsory

5. S. 9(2) of the Land (Underdeveloped Freeholds) Act. However, where the owner's development scheme has been approved, an additional notice requiring him (owner) to comply with the conditions (if any) of the approved scheme is to be served on the owner, irrespective of whether good cause has been shown before land can be compulsorily taken (S.9 (2) (b)).

acquisition power and take the land compulsorily. Thus, if the owner, by acquiescence, waives his claim to the notice to treat or the development notice and/or the subsequent notice to show good cause, he cannot take advantage of any irregularity which his own conduct has brought about in subsequent proceedings.⁶

Where land is acquired by compulsory process a notice of acquisition to this effect is published in the National Gazette and the notice specifies a public purpose for which the land is so acquired.⁷

Where a notice to treat is issued, it does not necessarily mean that the land to which it applies must be acquired. The notice can be withdrawn at any time prior to the acquisition of the land.⁸ Where the notice to treat is withdrawn compensation is to be paid to the claimants who would otherwise have been entitled to compensation if the acquisition proceeded. Such compensation is limited to any loss or expense incurred by the claimants by reason of the notice to treat having been given and withdrawn or by reason of an expectation that the land would be acquired.⁹ Compensation in this case may be as determined between the parties themselves. But in the absence of

6. Parrish, H., Cripps on Compulsory Acquisition: Powers, Procedures and Compensation, (7th. ed.), Stevens and Sons Limited, London, 1962 p.336.

7. S. 17 of the Land Act Ch. 185; S. 7 of the Lands Acquisition Act Ch. 192. The phrase "public purpose" is defined in Chapter 2 *supra*.

8. S. 16 (5) of the Land Act; S. 8 (4) of the Lands Acquisition Act.

9. See S. 16 (6) of the Land Act Ch. 185. See also Brown, D., Land Acquisition, op. cit., p.57; Fricke, G. L., Compulsory Acquisition of Land in Australia, op. cit., p.10.

an agreement, it may be determined by a Court.¹⁰

Circumstances where Land may be Taken without Notice to Treat.

The requirement of a notice to treat or a development notice is an important index for compulsory acquisition but it is not necessarily the only index. This is because there may be other ways in which the Government may exercise this element of acquisition.

The following are some of the ways in which land or interests therein may be compulsorily acquired without a notice to treat or development notice:-

First, where the Minister certifies that there are special reasons for acquiring land without following the normal procedural requirements then land will accordingly be taken without prior notice.¹¹ An instance of this would be an " emergency " situation as defined in S.226 of the Constitution where land is needed for the purposes of the emergency without delay. Second, where a person is authorized to enter any land for the purpose of ascertaining whether the land is developed in the best public interest¹² or whether it is suitable for a public purpose¹³ or where he is authorized

10. S. 16(6) of the Land Act.

11. See S. 16 (7) of the Land Act; S. 8 (5) of the Lands Acquisitions Act.

12. The Land (Underdeveloped Freeholds) Act, S.10.

13. S. 80 of the Land Act; S. 41 of the Lands Acquisition Act.

to enter and occupy any land if it is necessary to do so for a purpose connected with the carrying - out of a public purpose.¹⁴ Such authorized person may enter and occupy the land temporarily and is permitted to construct buildings, make roads, collect materials, demolish buildings and manufacture goods on the land in question.¹⁵

It seems that in all these circumstances the person or persons authorized to enter the land can do so without giving any prior notice. Thus, failure to serve the owners with the notice to treat or development notice would not necessarily prejudice the compulsory acquisition of the land or any interest therein. However, where the owner of the land or an interest therein suffers loss or damage as a result of such acquisition, the State is liable to compensate him. A qualification to compensation in this case is that if a person who holds State lease suffers loss or damage by reason of the person entering and inspecting the land the subject of State lease is not entitled to compensation.¹⁶

It is important to note that the provisions of the Land Act and the Lands Acquisition Act discussed above are especially affected by Division 111.3 of the basic rights in the

14. S. 81 of the Land Act.

15. S.82(1) and (2) of the Land Act; S.41 (1)(b) of the Lands Acquisition Act.

16. S. 84(2) of the Land Act.

Constitution of PNG, and in particular by SS. 44 and 53 which provide for freedom from arbitrary search and entry and protection from unjust deprivation of property respectively. It is, therefore, logical to argue that those who suffer or likely to suffer loss or damage as a result of the acquisition under these circumstances must be given some form of notice prior to the entry upon the land. This would enable them to take appropriate steps to avoid any potential loss or damage. Failure to do so would violate the basic rights of the owners therein affected.¹⁷ Compensation must be paid to the owners for such violations in addition to any compensation payable for any loss or damage sustained as a result of the acquisition of their land.

STATUTORY TIME - LIMITS.

The landowner who is served with the notice to treat or the development notice, as the case may be, is required to respond to the notice within the period specified in the notice. In the case of the notice to treat, for instance, the Land Act, S. 16, and the Lands Acquisition Act, S. 8, require the landowner to act in accordance with the notice within two months. On the other hand, in the case of the development notice the period required is three months under S. 3 of the Land (Underdeveloped Freeholds) Act.

17. See S. 44, " Freedom from Arbitrary Search and Entry, " S. 53, " Protection from Unjust Deprivation of Property, " of the PNG Constitution.

The imposition of time - limits by acquisition statutes could cause injustice to the landowners. For instance, since most of the landowners in PNG, especially the owners of customary land are still living in very remote areas with poor communication services and no accessible roads, the prescribed period may not be sufficient. It is possible, therefore, that any such notice may not reach the owners or if it does the owners may not have sufficient time to respond to the notice prior to the expiration of the prescribed period. Where the owners' failure to act within the time - limits was due to circumstances beyond their control, the question then becomes whether or not the owners have a right to seek any relief. It appears that the landowners have a right to apply to the National Court for an extension of the time - limits.

The National Court in such cases has power to grant extension of time - limits imposed by statutes where in the circumstances of the case it is just and proper to do so in order to avoid any injustice. Thus, in The State v. Giddings,¹⁸ an application for

18. [1981] P.N.G.L.R. 423. In this case the applicants were dissatisfied with the decision of the District Land Court made under the Land Disputes Settlement Act 1975. They could not lodge any appeal against the decision because they were prevented from doing so by S.61 of the Act. The applicants sought to apply for a writ of certiorari to quash the decision of the District Land Court under the Rules of the National Court which provide for such applications to be made within six months after the decision. But due to circumstances beyond their control they were twenty months too late. The applicants nevertheless applied to the National Court for an enlargement of the six months time - limit in which to apply for a writ of certiorari. The application was granted.

a writ of certiorari to quash the decision of the District Land Court was made outside the statutory time - limit due to circumstances beyond the applicants' control. It was held by Kearney, Dep. C.J. that the National Court has unfettered discretion to extend time - limits under the Rules of the Court provided the applicants can make out a substantial case that injustice may occur if the Court did not grant the application. The unfettered discretion of the Court to enlarge time exists so that injustice may be avoided. It must, however, be exercised judiciously and in accordance with what is just and proper.¹⁹ In other words, like all statutory discretions it must be exercised in accordance with law; it cannot be exercised in bad faith or for some irrelevant purpose.²⁰

The point to note in the above case is that the applicant seeking a relief must establish that the delay or failure to exercise other remedies was not due to his own act or omission. Thus, if the owners of the land to which the notice to treat or the development notice applies did not respond to the notice within the specified time because of the poor communication services or remoteness of their community in the country, it would be just and proper for the National Court to grant the extension of the two months time - limit imposed by the Land Act and the Land Acquisition Act or the three months imposed by the Land (Underdeveloped Freeholds) Act.

19. At p. 433.

20. J. D. & S. W. Mudge v. The Secretary for Lands, op. cit., at pp. 12-13.

Although the Land Act and Lands Acquisition Act establish time - limits subsequent to the service of the notice to treat within which the landowners must respond to the notice, neither Act establishes a time - limit within which the Government must complete the acquisition. All that the two Acts provide is that they contain express provisions fixing the Gazette notice as the date of acquisition.²¹ This could cause injustice as years may pass before the procedure for the acquisition is effected.²² There appears to be no authority which would in normal circumstances enable the court to compel the Government to decide whether or not to proceed with an acquisition once the notice to treat has been served. A lengthy delay in completing an acquisition could be interpreted, however, as evidence that either the purpose of the acquisition did not exist at the time of service of the notice to treat or it had since ceased to exist. If so the validity or continuing operation of the notice to treat could be questioned. The owners in this instance may be entitled to equitable relief or compensation. However, such relief is subject to certain qualifications as demonstrated by the decision in the case of Simpson Motor Sales (London) Ltd. v. Hendon Corporation.²³ In that case there was a significant delay in acquisition after the notice to treat was served and the owners of the land sought equitable relief. Lord Evershed held that those (owners) seeking such relief would need to establish that

21. The Land Act, S. 17 and the Lands Acquisition Act, S. 7.

22. See Duncan v. Minister of Education [1969] V. R. 362.

23. [1964] A. C. 1088. See also Duncan v Minister of Education, (ibid) where there was six years delay in completing the acquisition.

there has been on the part of the acquiring authority something in the nature of bad faith, some misconduct or abuse of power and/or that the owners or those seeking the relief have been placed in an unfair position because of the long period which has elapsed since the service of the notice to treat.²⁴ In other words, delay by the acquiring authority in acquiring the land is not a sufficient ground to disentitle them from proceeding to acquisition if it was based on good conscience unless those seeking the relief established one or both of the above elements.

As opposed to the Land Act and the Lands Acquisition Act, the Land (Underdeveloped Freeholds) Act establishes a time - limit subsequent to the expiration of the period specified in the notice within which the Government must complete the acquisition.²⁵ It imposes a 6 month time - limit. The time - limit in this case has a double effect. First, that the Government must complete the acquisition only within 6 months after the period specified in the notice has expired, not at the end of the six months. Second, that if the Government has failed to complete the acquisition within this six months it would be seen as a waiver of the right to acquire land on the part of the Government. It would appear, therefore, that any acquisition subsequent to the expiration of the six months would not be valid as the Government would not have the power to do so. This situation differs from that in Simpson Motor

24. Ibid, at p. 1127.

25. See S. 9(3).

Sales (London) Ltd. v. Hendon Corporation,²⁶ as in the case of the Land Act and the Lands Acquisition Act, in that acquisition statutes in that case do not impose any time-limit within which the acquiring authority must complete the acquisition. As a result of this, the delay on the part of the acquiring authority in this case (Simpson Motor Sales (London) Ltd.) to acquire the land did not prevent them from proceeding with the acquisition. However, the Simpson Motor Sales (London) Ltd. case was an example of a case where the delay on the part of the acquiring authority was based on good conscience and no detriments were suffered by the owners due to the delay.

Otherwise equitable relief would apply in favour of the landowner.

DISCRETIONARY POWER OF THE MINISTER TO ACQUIRE LAND BY COMPULSORY PROCESS.

Where compulsory acquisition power of the Government is allowed, it is usually exercised by some individual or authority on behalf of the Government.²⁷ In some instances, acquisition statutes would confer absolute discretion on such individual or authority in respect of the exercise of the power. In the case of the Lands Acquisition Act, for instance, S.7 of the Act confers absolute discretionary power on the Minister to

26. See footnote 23.

27. The current Land Act, S. 17; the Lands Acquisition Act, S. 7; the Lands (Underdeveloped Freeholds) Act, S. 9 provide for the Minister for Lands to exercise compulsory acquisition power on behalf of the Government.

acquire land by compulsory process. It provides that:

“ Notwithstanding anything in any other law, where in the opinion of the Minister it is necessary to do so for the purposes of this Act, the Minister may “ acquire the land by compulsory process.

The words “ in the opinion “ indicate that the Minister in this instance has a discretion to decide on his own accord whether land is to be acquired and takes no advice from any person or authority. There appears to be no provision in the Lands Acquisition Act which would allow for checks to be made on the Minister’s power to ensure that he exercises his power in good faith. On the other hand, it could be argued that, like all statutory discretions, the Minister will have to exercise his power in accordance with law. Thus, in J. D. & S. W. Mudge v. The Secretary for Lands²⁸ where similar discretionary power vested in the chairman of the Land Board under S.9 of the Land Act was abused, the court observed that the phrase “ in his opinion “ indicates that there is a discretionary power vested in the official concerned, “ but like all other statutory discretions, it must be exercised in accordance with the law. It cannot be exercised in bad faith or for some irrelevant purpose, but be exercised in accordance with the objects of the Act “. ²⁹ The Minister in the instance case must exercise his discretion in good faith for the purposes of the Lands Acquisition Act.³⁰

28. See footnote 1.

29. Ibid., at pp. 12-13.

30. The purposes of the Act are public purposes as defined in S.1 of the Act.

According to the CILM, the Courts and the Parliament of PNG would provide effective checks on the Government's power of eminent domain especially under the circumstances such as that of the Minister to exercise the compulsory acquisition power described above. It recommended that provisions be made in the legislation to allow for the court to check the facts surrounding a compulsory acquisition to see if the Government is taking the land in good faith for a genuine public purpose. It also recommended that all notices of compulsory acquisitions be tabled in the Parliament so that Parliament can examine them and cancel them if it sees fit.³¹ The latter recommendation, it appears, would be implemented in the Land Law Reform Bill (Final Draft) 1982 where the Bill requires the notice of intention take land to be tabled in the appropriate Provincial or the National Parliament.³² It is anticipated that this would provide a valuable check on the Government's executive power.

THE EFFECT OF NOTICE OF ACQUISITION PUBLISHED IN THE NATIONAL GAZETTE.

Generally, at the end of the period specified in the notice to treat or the development notice and/or any subsequent notices (if any) thereof, land is compulsorily acquired

31. See the CILM Report, Recommendation 53.

32. See Final Draft, Amalgamated Land Act, Land Law Reform, Drafting Instructions, Department of Lands, Port Moresby, October 1982 Cl. 3.0.10.

by a notice of acquisition published in the National Gazette. The effect of this notice is that upon its publication, the subject land is vested in the State, freed and discharged from all encumbrances, whether legal or equitable.³³ Also once the acquisition notice is issued the interest of every person in the land is converted into a right to claim compensation against the Government.³⁴

The Lands Acquisition Act, S.40, provides that the notice of acquisition is conclusive evidence of the matter specified therein and is not to be challenged in any court of law. That provision appears to prevent any dispute as to the validity or otherwise of the notice and purports to oust the jurisdiction of the court from inquiring into the validity of the notice of acquisition or the matters specified therein. However, S. 40 provisions are not absolute. Under S.37 of the Constitution of PNG “ a determination of the existence or extent of a civil right or obligation shall not be made except by an independent and impartial court or “ any “ other authority prescribed “ for that purpose or by an agreement between the parties.³⁵ Also under S.155(3)(a) of the Constitution “ the National Court has an inherent power to review any exercise of judicial authority “ , and by Subsection (4) of the section, both the Supreme and National

33. See S. 17(2) of the Land Act; S. 7(2) of the Lands Acquisition Act Ch. 192. This does not affect charges and rates owed to Local, Community or Provincial Governments, etc. (S.7 (2) (b)).

34. See S. 19 of the Land Act Ch. 185; S.12 of Lands Acquisition Act Ch. 192. The issue of compensation is discussed in detail in Part III, Chapter 3.

35. See Subsection (11) of S. 37.

“Courts” have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case”. Furthermore, by S.57 of the Constitution, any person is to go to the courts, including the National Court to have his claimed right enforced so long as he or she is a person who has an interest in the matter, whether personal or not. The court is given a discretion to hear the person on the matter in question. S.40 of the Lands Acquisition Act is subject to SS. 37, 57 and 155 of the Constitution. If there is anything to suggest that the court, particularly the National Court is excluded by S.40 “then by the operation of the Constitution that much would be rendered unconstitutional and of no effect”.³⁶ This is because any statutory provision which is inconsistent with the constitutional provision is invalid to the extent of the inconsistency.³⁷ Thus, if an individual alleges that his private right has been adversely affected by reason of the publication of the notice of acquisition or matters stated therein he can apply to the court under S.57 of the Constitution to have his right enforced. It is the duty of the National Court under its inherent power in S.155(3) to inquire into the validity of the notice or the matters specified therein in order to determine whether the individual's right has in fact been violated as alleged. Unless the claim of the individual in question is

36. See Reva Mase v. The Independent State of Papua New Guinea (Unreported) National Court Judgement (Interlocutory Judgement) 1/10/80, No. 260 at p. 3

37. See Douglas Charles Dent v. Thomas Kavali (Minister for Lands) [1981] P.N.G.L.R. 488 at p. 491; Also see S.11 of the Constitution of the Independent State of PNG.

vexatious or trivial the National Court or the Supreme Court may declare the notice of acquisition invalid and of no effect pursuant to S.155(4).

This is well demonstrated in Reva Mase v. The Independent State of Papua New Guinea.³⁸ In this case the land in dispute was declared as State land under S.8 of the National Land Registration Act 1977 and gazetted on 17th May 1979. The land was subsequently occupied by the Government. S.9 of the Act prevents any appeal or review of the Minister's declaration. The plaintiff claimed that his clan were the owners of the land by custom. He sought possession and demanded that the defendant vacated the land as it was an unlawful occupant. It was argued on behalf of the State that the Minister's gazettal of the subject land is conclusive by operation of S.8 of the National Land Registration Act and that the land is State land; consequently S.9 of the Act ousted the jurisdiction of the National Court. Narakobi, A. J. rejected the argument holding that whatever the restrictions an Act of Parliament might seek to place on the jurisdiction of the National Court, the National Court has an inherent power of review where, in its opinion, there are overriding considerations of public policy in the special circumstances of a particular case. In other words, the Act cannot cut out the jurisdiction of the National Court to review any exercise of the judicial authority.³⁹

38. See footnote 36.

39. Ibid at pp. 1-3.

It may be argued that the power of the National Court under S.155(3)(a), comes into play only if the declaration of the Minister published in the Government Gazette is regarded as a judicial function. In other words, the publication of the declaration in the Government Gazette by the Minister is an administrative act and not judicial act, and therefore the National Court's power under S.155(3)(a) does not apply. But as Narokobi, A. J. noted in the Reva Mase case, whether the Minister's act can be regarded as a judicial function or not is merely a question of characterization of functions or acts of the Minister. "What is material is whether a person following the gazettal who has an interest in the matter genuinely believes he is adversely affected".⁴⁰

Furthermore, where a statutory provision seeks to prevent any appeal from an act or omission the courts in PNG would normally hold that it bars an appeal, not an application for a review. A case which exemplifies this position is The State v. District Land Court Ex Parte Caspar Nuli⁴¹ which dealt with the effect of S.61 of the Land Disputes Settlement Act 1975. The section provided that the effect of a decision of a District Land Court "is final and not subject to appeal in any way". The State in that case applied for a writ of certiorari to quash the decision of the District Land Court on the ground that there was an error of law on the face of the record. It was maintained

40. At p. 6.

41. [1981] P.N.G.L.R. 192.

by the respondent that S.61 of the Land Disputes Settlement Act barred any appeal to the National Court thus ousted the jurisdiction of the court to review the decision of the District Land Court and grant the relief sought in accordance with Subsections (3) and (4) of S.155 of the Constitution. Bredmeyer, J. in that case drew a distinction between an " appeal " and an application for a review. His Honour held that S.61 prevents an appeal to the National Court of Justice but it is not effective to prevent an application for review by means of a prerogative writ. Accordingly, S.61 could not oust the jurisdiction of the National Court.

The approach taken in this case illustrates the point that although S.40 of the Lands Acquisition Act may prevent a person who has been divested of his interest by the power of compulsory acquisition from appealing to the National Court to challenge the validity of the acquisition, it will not effectively prevent him from applying to the Court for a review. It seems clear therefore that, as Narokobi, A. J. noted, " as a matter of Constitutional law, there is really no way the State can avoid the jurisdiction of the National Court ".⁴² Once the Minister's declaration or notice is published in the National Gazette a party or person aggrieved may either go to the Land Titles Commission or to the Courts, depending on whether his claim relates to customary land or non - customary land respectively.⁴³

42. Reva Mase v. The Independent State of Papua New Guinea ,op. cit., at p. 8.

43. For courts having jurisdiction in respect of such matter, see S. 16 (1), S. 84 (1) and Part XI of the Land Act; S. 15 and Part III of the Lands Acquisition Act.

Moreover, the courts in PNG would grant an application for a review under S.155 of the Consitution, even if such application was made outside the statutory time - limit, if the court forms the opinion that to do otherwise would cause injustice under the circumstances of the particular case. Such was demonstrated in the case of Douglas Charles Dent v. Thomas Kavali (Minister for Lands).⁴⁴ Although the facts of the case are not relevant for the purposes of this discussion, the decision in that case throws a further light on the point that statutory time - limits on appeal will not effectively oust the constitutional power of the National Court under S.155 to grant an application for a review or an order . In that case the applicant's residential lease was forfeited by the State under S.46 of the Land Act⁴⁵ for alleged non - development of the lease within the given period. The plaintiff's case for not developing the land within the period covenanted was that the land was steeply sloping and that he had to spend quite a substantial amount carrying out levelling and drainage works prior to the actual development of the lease. Before he completed the works, the lease was forfeited. After the time allowed for both appeal under S.121(2) of the 1962 Land Act⁴⁶ and a six months time - limit imposed by O.81 r.7 of the Rules of the Supreme Court for applications for certiorari had expired, the applicant obtained a writ of summons seeking a declaration that the forfeiture was void and of no effect.

44. [1981] P.N.G.L.R. 488.

45. S. 54 of the pre-revised 1962 Act was cited in that case.

46. The corresponding section in the current revised Land Act Ch. 185 is S. 112 (2).

The defendants demurred to the plaintiff's application seeking declaratory relief on the ground that his real remedy was by way of appeal (the time for which had expired) under S.121(2) of the Land Act.

Bredmeyer, J. presiding, held that in seeking a declaratory order, the plaintiff is seeking to invoke S.155(4) of the Constitution which is the supreme law of PNG and superior to any statute and the National Court thus has constitutional power under S.155(4) to grant a declaratory order involving the determination of questions arising under the Land Act in disregard of the time - limit on appeal imposed by S.121(2) of the Act.⁴⁷ The plaintiff was, therefore, not barred by S.121(2) from seeking declaratory order; whether or not he succeeded in getting a declaration lies in the discretion of the Court. The court in this case took the view that the applicant (plaintiff) had a good cause for not being able to develop the leasehold land within the stipulated period and that to do justice under the circumstances the application had to be granted, even though it was made outside the statutory time - limit for an appeal or a review. Thus, if a person whose interest has been adversely affected by some act or omission on the part of the Government feels he has a good ground for not being able to act within the statutory time - limits as in the instance case he could apply to the National Court under S. 155 of the Constitution for a review. If the Court is satisfied that the person concerned has a genuine case, it would not hesitate to invoke the

47. Op. cit., at p. 491.

power under S. 155 in order to do justice under the circumstances. It is immaterial whether or not the application for such a review is made within the time - limit.

CONCLUSION

The procedures for compulsory acquisition are important in several respects. For one thing, they alert the landowner about the action the Government proposes to take regarding his land and give him an opportunity to take necessary steps to avoid or minimise any possible loss or damage. Also they give the landowner an opportunity to negotiate with the Government with a view to voluntarily surrendering his land to the State prior to the exercise of the power of compulsory acquisition thus avoiding any possible ill - feelings on the part of the landowner. Further they restrain the Government from exercising compulsory acquisition power until the period specified in the notice to treat has expired. However, it could be argued that the period specified in the notice to treat may not be sufficient for two reasons, especially where customary land is involved. First, most of the customary landowners live in remote rural areas with poor roads and communication systems and second, the ownership of customary land often involve a lot of people. It would therefore require much more time than specified in the notice to treat in order to bring the notice of the intended acquisition to as many of the owners as practicable. If the landowners fail to act in accordance with the notice to treat within the stipulated period due to lack of transport or poor communication they can apply to the court for an extension of the time - limit,

even if an Act of Parliament seek to oust the jurisdiction of the court as demonstrated by the above cases.

It is apparent from all those cases that where statutes seek to oust the jurisdiction of the National Court by attempting to prevent any appeal, the Court would invariably hold that although it may be prevented from entertaining an appeal it cannot be prevented under any circumstances from entertaining an application for a review by means of prerogative writs. The National Court has an inherent constitutional power to review any exercise of judicial authority under S.155(3) and to make such orders or declarations in the nature of prerogative writs as are necessary to do justice in the circumstances of each case under S.155(4) of the Constitution. Even if S.155 of the Constitution did not exist, at common law prerogative writs lie even where a statute declares the decision of an inferior court to be "final".⁴⁸ It is immaterial whether an act or omission complained of can be characterized as an administrative or judicial. What is material is that a person who has an interest in the subject matter of the complaint, whether personal or not, can maintain a claim if he genuinely believes his interest has been adversely affected by the Act or omission thereof complained. In such cases the National Court may exercise its power under S.155 of the Constitution notwithstanding any ouster provisions in the statute. As pointed out above there is thus really just no way the State can avoid the jurisdiction of the National Court by an inclusion of the ouster provisions in the Statute.

48. See footnote 41.

CHAPTER FIVE

PURPOSE OF COMPULSORY ACQUISITION.

INTRODUCTION.

As noted in Chapter Three, the principle that compulsory acquisition of land must satisfy the criteria of public purpose is recognized in the Constitution of PNG. By S. 53 of the Constitution, compulsory acquisition of land is not allowed unless it is for a public purpose or for a reason that is reasonably justified in a democratic society. Any acquisition of private property therefore demands the acquiring authority to comply with the strict requirement of public purpose. "Public purpose" is therefore one of the very important requirements of the exercise of the compulsory acquisition power in PNG.

This chapter examines the definition of public purpose as set out in the Land Act,¹ the Land Acquisition Act² and the National Land Registration Act.³ It also examines the provisions of the proposed Land Law Reform Bill (Final Draft) 1982 on public purpose.

1. Chapter 185, S. 1

2. Chapter 192, S. 1

3. Chapter 357, S. 3

PUBLIC PURPOSES DEFINED.

A comprehensive definition of public purpose is provided in the Land Act Chapter 185.

1 of the Act defines public purpose as:

- (a) a purpose connected with the defence of Papua New Guinea or for securing the public safety of Papua New Guinea; or
- (b) a purpose of public health, utility, necessity or convenience; or
- (c) the purposes of or connected with a quay, pier, wharf, jetty or landing place; or
- (d) the purposes of or connected with an aerodrome or landing pad; or
- (e) the purposes of or connected with a road, track, bridge, culvert, ferry or canal; or
- (f) a purpose of or connected with navigation or the safety of navigation by land, air or water; or
- (g) a purpose of or connected with radio, telegraphic, telephonic or other communication; or
- (h) the purposes of a hospital, school, training institution, public library or other similar institution; or
- (i) the purposes of an agricultural, horticultural, veterinary or forestry experimental, treatment or demonstration institution; or
- (j) the purposes of a reservoir, aqueduct or water - course; or
- (k) port or harbour purposes; or
- (l) the purposes of or connected with the generation or supply of electricity; or
- (m) the purposes of a common; or
- (n) the purposes of a stock route or camping or watering place for travelling stock; or

- (o) the purposes of or connected with reafforestation, water conservation, the prevention or control of soil erosion or the reclamation or rehabilitation of land; or
- (p) a purpose of industrial development; or
- (q) the purposes of the National Broadcasting Commission or the Department of Transport and Civil Aviation; or
- (r) the purposes of accommodation for employees of the State and any other prescribed authority; or
- (s) the purposes of a cemetery or other place for the interment of the dead; or
- (t) the purposes of a coronous pit or a quarry; or
- (u) the purposes of or a purpose connected with a welfare centre; or
- (v) a purpose declared by any law to be a public purpose for the purposes of this Act; or
- (w) a purpose ancillary to or necessary or convenient for the carrying out of a purpose referred to in any of the preceeding paragraphs of this definition.

compulsory acquisition of land must, therefore, be for one or more of the public purposes as set out under S. 1 of the Land Act. The acquisition of land for a purpose or reason connected with any of these purposes or a public purpose as declared by any other legislation for that matter is deemed to be reasonably justifiable for the purposes of S. 53 of the Constitution of PNG.⁴

⁴ Prior to the enactment of the pre - Independence 1962 Land Ordinance the Land Ordinance 1906, S. 33, the Land Ordinance 1911, S. 58 and the Lands Acquisition Ordinance 1914, S. 13 (of Papua) and the Imperial Ordinance 1903, S.1 and the Land Ordinance 1922, S. 68 (of New Guinea) made provisions for the Administration to compulsorily acquire land, alienated or unalienated, from any landowner.

new or Additional Public Purposes.

The public purposes as set out in the Land Act are directly based on the 1962 Land Ordinance. As such they are not always appropriate for the changing circumstances of PNG today. New legislative measures are needed to introduce new or additional public purposes in order to deal with the new circumstances. The enactments of the Lands Acquisition Act and the National Lands Registration Act are therefore necessary to meet such needs.

The Lands Acquisition Act⁵ and the National Lands Registration Act⁶ have extended the definition of public purpose as set out in S. 1 of the Land Act. The Acts have extended the public purpose to include a purpose connected with resettlement of residents of urban areas,⁷ educational, social welfare or community purposes, urban development or land settlement purposes for land short people. This is so as to effect the policies of the Government to develop rural areas and where necessary to assist such citizens who are urban dwellers to achieve a better standard of living. In addition, however, in accordance with the government's plantation redistribution programme, the term public purpose is further extended in the Lands Acquisition Act, S.1, to cover

4. Chapter 192, S. 1

5. Chapter 357, S. 3

6. This provision is intended to deal with squatters who are on either Government land or customary land within urban areas.

compulsory acquisition of land for the purposes of making it available to automatic citizens for subsistence farming where other land for that purpose is insufficient in an area or for economic development so that they may share in the economic progress of the country.⁸ A case which illustrates this is Frame v. Minister for Lands, Surveys and Environment.⁹ In that case the Minister for Lands acquired a plantation land owned by Mr. Frame in accordance with the Government's plantation redistribution programme in order to return it to the former customary owners of the land for the purposes of economic development.¹⁰

The extended definition of public purpose in the Lands Acquisition Act to acquire land by compulsory process for the purpose of redistribution to land short Papua New Guineans cannot escape criticism. Indeed the Act has been criticised as violating the principles that the power of compulsory acquisition is directed to community benefits generally, not individuals.¹¹ Arguments in support of this criticism are firstly, that as far as the terms of the Act are concerned, it is possible for land to be acquired in order to be made available to an individual or individuals for his or their own personal benefit.

8. The Mining Act (Amalgamated) Act, S. 20, allows for the acquisition of land for the purposes connected with mining. These are new public purposes added to the list of public purpose in the Land Act Chapter 185, S. 1.

9. (1979) P.N.G.L.R. 626.

10. See Goal 2 of the National Goals and Directive Principles of the PNG Constitution, op. cit., pp. 2-3. Also see the CPC Report, op. cit., pp. 2/1-2/2 for the Eight Points Improvement Plans of the Government.

11. See James, R. W., Land Tenure in Papua New Guinea, op. cit., Ch. 4.

secondly, since the Act only affects alienated (non - customary) land, and not customary land, it excludes most of the land in PNG (about 97 per cent)¹² from its ambit, thus putting a tremendous strain on the owners of alienated land who possess only less than 3 per cent of the land. Furthermore, the scope of the Act would alarm the new and potential investors and discourage any further development by existing landowners.¹³

The additional public purposes contained in the Lands Acquisition Act and the National Land Registration Act mentioned stemmed directly from the CILM recommendations which called for compulsory acquisition powers of the Government to be extended to cover new public purposes.¹⁴ This is because the National Government, like any government elsewhere, must have ample power to acquire land compulsorily for public purposes. Accordingly, the Commission recommended that the public purposes stated in S. 1 of the Land Act be extended to give the National Government the power to (a) acquire developed land with a view to redistributing it to Papua New Guineans who are acutely short of land for cash cropping or subsistence purposes, (b) acquire land generally (alienated or unalienated) for land settlement schemes for landshort Papua

2. Customary (unalienated) land in PNG constitutes about 97 per cent whilst non - customary (alienated) land constitutes only about 3 per cent. See the CILM Report, op. cit., p. 17; Haynes, C., " Succession to Land in PNG: Choice of Law ", op. cit., p. 74; James, R. W., ibid., p. 20; Antoninus, M., " The Tolai Land Case ", op. cit., p. 106.

3. James, R. W., ibid, pp. 62-63.

4. See the CILM Report, op. cit., Ch. 6.

ew Guineans, and, (c) for essential town growth. Moreover, the CILM realised that the national Government will need to acquire more land in the future for public purposes, particular for the purposes of setting up new businesses for Papua New Guineans or joint enterprises between foreign investors and Papua New Guineans or for the purposes of providing land for urban dwellers and any other persons who have either free or no customary land.¹⁵ Accordingly, it urged the Government not to be "afraid" to exercise the powers of compulsory acquisition in the event where the land owners refuse to voluntarily surrender their land to the Government which it urgently needs for public purposes.¹⁶ A qualification to this, however, is that the Government should always, in the first instance, attempt to enter into negotiations with the owners with a view to purchasing the land before it could acquire the land by compulsory process.

Public Purposes under the Proposed Land Law Reform Bill (Final Draft)

1982.

The new Land Law Reform Bill 1982 to amalgamate all existing Land Acts contains more comprehensive public purposes. This is because firstly, it will contain additional public purposes which are not found in the Land Act, the Lands Acquisition Act or the National Land Registration Act and secondly, it will classify the public purposes into

15. Ibid, pp. 86-87.

16. Ibid, p. 89.

Class A, B and C Purposes".¹⁷ "Class A Purposes" are purposes for which land may compulsorily "dedicated" to the State or an appropriate Provincial Government.

"Class B Purposes" are purposes for which land or interest in land may be compulsorily "dedicated" or purchased but would be subject to prior consultation with landowners on settling.¹⁸ Finally, "Class C Purposes" are those for which land may be either compulsorily "dedicated" or purchased. However, where customary land is involved compulsory dedication or purchase will take place only after tabling a plan for the dedication or purchase as such in the National Parliament or an appropriate Provincial Parliament.

"Dedication" is a new procedure which will be introduced under the new law. The main purpose of this procedure is to secure to the State the use of land for public purposes whilst at the same time ensuring that customary land rights which are not inconsistent with the public purpose on the subject land continue to exist in the land. The land in this case is not acquired outright as has been the case under the existing law.¹⁹ Thus, the new law will enable the Government to secure land for certain public purposes with appropriate compensation to the owners, but at the same time without

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7. See the Final Draft, Amalgamated Land Act, Land Law Reform, Drafting Instructions, Department of Lands, Waigani, 1982 pp. 11-13. (Copy personally held)
8. It is rather doubtful as to what is meant by 'settling'. The new law does not appear to define it. Presumably it means resettlement of the landowners.
9. See the Final Draft, Amalgamated Land Act, Land Law Reform, Drafting Instructions, op. cit., pp. 4-11.

necessarily acquiring all the rights in the land.

POWER TO DECLARE NEW PUBLIC PURPOSE.

Although the Government as the executive organ of the State, must have power to take lands to meet public needs, the power to take must be distinguished from the power to declare public purposes. This was the position taken by the CILM which felt that the latter power should be reserved to the National Parliament to the exclusion of all other authorities so that a declaration of a new public purpose should be made only by the Parliament.²⁰ The CILM objected to the Land (Definition of Public Purposes) Bill, 1973 which sought to give the Administrator-in-Council the power to declare any purpose to be a public purpose. This is because the Commission considered this power to be too wide and unexaminable either by the Courts or the Parliament, and could lead to abuse by the Government. The Commission also rejected the view that one cannot foresee all public purposes and thus give the Government of the day all the power to decide whether a need is a public purpose. The CILM instead suggested that if a new need emerges then the Government can request the National Parliament to declare and add it to the public purposes list in the Land Act or any other Act for that matter.²¹ This means that Parliament could reject it if it was not a true public purpose and would provide constant check on the Government's power. This is extremely important for

20. See the CILM Report, op. cit., Ch. 6.

21. Ibid, pp. 88-90.

most Papua New Guinean landowners who would not know whether their land has been taken for bona fide purposes or otherwise.

PUBLIC PURPOSE FOR WHICH LAND IS COMPULSORILY TAKEN TO BE
EXPRESSED IN THE ACQUISITION NOTICE.

s. 17 of the Land Act Chapter 185 enables the Minister to acquire land by compulsory process for a public purpose specified in the notice of acquisition. The purpose for such acquisition must be expressed in the notice of acquisition; it must also be plain from the notice that the land is in fact required for a public purpose. There is no judicial decision on this issue as yet in PNG, however, a brief glance at some Australian decisions may help throw some light on our knowledge of the matter. In the case of Caldwell v. Rural Bank of New South Wales,²² where a notice of acquisition had been published in the Gazette to the effect that the land in question was acquired in order to provide public offices at Young for the Rural Bank, it was held that the expression public offices in S. 1 of the Public Works Act 1912 referred to offices for the housing of Departments of State. It did not include buildings which were public only in the sense of being owned, held by or on behalf of the State. It was further held that the expression public offices did not include the purpose expressed in the notice of acquisition as one of the works deemed public purposes and was not to be treated as such. Had the offices for which the land was acquired been for the Housing of any State Department or had the

²². (1952) 53 S.R. (N.S.W.) 415.

expression public offices been defined in the Public Works Act as one of the works deemed public purposes the decision would have been otherwise.

The holding in the Caldwell case seems to indicate that to state in the acquisition notice that land is required for a particular instrumentality, agency or corporation of the State identified by name is not sufficient. In the case of Jones v. Commonwealth (No. 1),²³ an authorization notice under S. 10 (3) of the Lands Acquisition Act 1955-1966 (Cth) stated that the land had been acquired for "the following public purpose approved by the Governor-General - the Australian Broadcasting Commission at Ripponlea Victoria". It was, however, held by the High Court that the ABC was not a purpose within the meaning of the Act although its activities may have amounted to purposes. The notice of acquisition did not specify unequivocally that the acquisition was for a public purpose and failure to do so gave rise to a fundamental and fatal defect. The acquisition was, therefore, held invalid. However, in Jones v. Commonwealth (No. 2)²⁴ the defect in the notice referred to was said to be cured by the inclusion of the words "the provision of broadcasting and television studios and offices for the ABC in accordance with the Broadcasting and Television Act". What the Courts are saying in the above cases is that the acquisition notice must expressly state that land is acquired for a "public purpose" such as a school or a road, and not for a particular agency

3. (1963) 109 C.L.R. 475.

4. (1964) 112 C.L.R. 206.

instrumentality of the State because the latter is not a purpose, its activities may amount to purposes though.

acquisition " for the Purpose of the Act " .

Some acquisition statutes may enable an acquiring authority to acquire land by compulsory process " for the purpose of the Act ". For instance, S. 7 of the Lands Acquisition Act Chapter 192 enables the Minister to acquire land by compulsory process " for any of the purposes of this Act ". As distinct from the expression " public purpose ", the expression " for the purposes of the Act " is wide. It does not mean that the purpose for which the land was acquired must invariably be expressly contained in the Act. It may be implied. That is, a statement that the acquisition is for the purpose of the particular Act is usually sufficient to conclude the matter. Thus, in the case of Tinker Tailor Pty. Ltd. v. Commissioner for Main Roads,²⁵ where land was acquired for the purposes of the Main Roads Act 1924 (NSW), the High Court held that a statement that the acquisition is for the purposes of the Act, viz., the Main Roads Act was sufficient proof of the matter. In other words, the acquiring authority exercising the power of acquisition need do no more than refer to the purpose of the Act. similarly in Bromley v. Attorney General (NSW)²⁶ the Court held that a statement in the notice of the

5. (1960) 105 C.L.R. 334.

6. (1981) A.C.L.D. 115. A further exemplification is accorded by the case of State Planning Authority of N. S. W. v. Shaw (1970) 92 W. N. (N. S. W.) 311, where a

acquisition of land for housing purposes that the land was acquired for the purposes of the Housing Act was a conclusive statement and was not subject to examination by the courts.

The qualification, however, as to the statement that land be taken " for the purposes of the Act " is that there must be a connection between the declared purpose of the acquisition and the purpose of the Act. Thus, in Attorney - General (Vic) (Ex rel Australasian Realty Corporation Pty. Ltd.) v. Housing Commission,²⁷ where land was resumed for the purpose of urban expansion and development by the Housing Commission of Victoria, it was held that the resumption was ultra vires the purposes of the Housing Act. This was because the objects for which the Commission was established included: " The improvement of existing housing conditions " and " the development and sale of land for housing and related purposes ; " ²⁸ urban expansion and development was outside the objects of the Commission.

The expression " for the purposes of the Act " is also wide enough to cover acquisition

notice of acquisition was published in the Gazette declaring that the subject land was acquired " for the purpose of the State Planning Act 1953 and, that the said land is vested in the State Planning Authority of New South Wales ". The Court, following Tinker Taylor case above (see footnote 24), held that the above statement was sufficient explanation of the public purpose for which the land in question was acquired.

27. (1979) 44 L.G.R.A. 258.

28. S. 5 of the Housing Act 1958, *ibid*, p. 261.

land for a purpose which is incidental to the primary or general purposes of the enabling Act. In the case of State Electricity Commission v. McWilliams,²⁹ for instance, the State Electricity Commission was faced with the need for a greatly increased labour force, however, it could not attract labour unless adequate housing were to be provided. Accordingly, and in accordance with the Governor-in-Council's direction, it acquired and subdivided land, and then erected buildings thereon to house employees. The owner of the land challenged the validity of the acquisition and sought a declaration on the basis that the purpose of the State Electricity Commission in making and entering his land was not a purpose for which it was lawfully authorized to acquire land. It was submitted on his behalf that S. 23 of the State Electricity Commission Act 1958 (Vic) permitted acquisitions thereunder to be limited to acquisitions "for the purposes of this Act", which involved the generation of electricity, and not the subdivision of land and the carrying out of the functions of a housing authority including the provision of shops and other ancillary services. The acquisition, subdivision and the subsequent erection of buildings for the purposes of housing employees ultra vires the powers of the Commission.

The Supreme Court accepted this argument and granted the relief sought by the owner, the plaintiff. However, the High Court, upon appeal by the Commission held the acquisition to be valid under the circumstances saying that the acquisition of land for the purpose of establishing a new settlement for employees was sufficiently incidental

²⁹. (1954) 90 C.L.R. 552.

the general purposes of the Commission to fall within the power conferred by S. 23 of the State Electricity Commission Act. The provision of homes for employees was merely incidental to the effectuation of the purposes for which the legislation, namely the State Electricity Commission Act, was design. On the question of the provision for shops and other ancillary services, the Court held that the addition of the amenities of a town was not too remote from the conduct of the under-taking to be regarded as incidental to it because without these essential services the Commission could not hope to obtain the labour force necessary for its purposes.

A difficulty may arise where legislation does not expressly state the "public purpose" for which land is to be acquired or that land is to be acquired "for the purpose of the Act", as was demonstrated in the case of Geita Sebea and Others v. The Territory of Papua.³⁰ The land in that case was compulsorily acquired under the Lands (Kila Kila Aerodrome) Acquisition Ordinance 1939 from the natives of Kila Kila village in Port Moresby for the purpose of constructing an aerodrome. The 1939 Act did not specifically authorize a public purpose, however, the preamble stated that the lands described in the schedule are required immediately for the purposes of or connected with the Kila Kila Aerodrome. The High Court held that the statement, "for the purposes of or connected with the Kila Kila Aerodrome" was sufficient to conclude the matter. An inference one could draw from this decision is that the Court interpreted the statement, "for the purpose of or connected with the Kila Kila Aerodrome," to mean "for the

30. (1941) 67 C.L.R. 544.

purpose of this Act ". Had it not been for the above statement it is doubtful whether the court would have arrived at a similar conclusion.

CONCLUSION.

When land is compulsorily acquired, it must be for a public purpose as defined by acquisition legislation. In other words, the purpose for which the land is acquired must fall under any one of the public purposes as set out under any of the above Acts. The requirement that the purpose for which the land is required must be a public purpose is therefore very important because generally it restrains the Government from exercising the power of compulsory acquisition with respect to any land unless it is for a public purpose. Acquisition of land for a purpose other than a public purpose will be seen as an infringement of the fundamental property rights as protected in S. 53 of the Constitution of PNG and therefore invalid and ineffective.

CHAPTER SIX

COMPENSATION FOR COMPULSORY ACQUISITION.

INTRODUCTION.

Another qualification to the powers of the Government to acquire land is the requirement that in the event of any such acquisition compensation be paid to the dispossessed owner. Compensation implies the return of " the equivalent in value of the property taken but not necessarily in money: ... the amount of compensation must be just equivalent and the principles and manner of determining compensation must be such as to ensure that it is just and reasonable ...".¹ According to Speedy compensation is a metaphorical word; the idea has been derived from a " pair of balances ". It is to be proportionate to the loss sustained; that is, an equivalent to what is taken from the owners.²

In PNG acquisition statutes have not defined the expression " compensation ".

However, in the case of Re Ratavul Land,³ Phillips C. J. of the former Territory of New

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1. Umeh, J. A., Compulsory Acquisition of Land and Compensation in Nigeria, Sweet & Maxwell, London 1973 p. 42.
 2. Speedy, S.L., Compensation for Land Taken and Severed, Legal Research Foundation Inc., Auckland, 1978 p. 4.
 3. ' Assessment/Compensation Court ' (1939) Unreported ' Judgement ' No. 206. This case is printed in Haynes, C.E.P., Land Law and Land Policy in PNG: Texts, Cases and Materials, (Part III), UPNG Printery, Port Moresby, 1984 pp. 78 - 85.

ineia, said that the word " compensation ... does not include compensation for injured feelings or soreness or disappointment because of the over-riding and compulsory nature of a resumption, but means compensation for the loss (perhaps one might call it a material loss) suffered by a person dispossessed by the resumption ". ⁴ In the same case Phillips C. J. cited with approval a definition provided by Wanliss C. J. who, when making his compensation award in the Mortlock Islands Arbitration in 1930, said: " [by] compensation, I take, is meant such a sum as will prevent the property owner from suffering at a pecuniary loss because of the resumption; it does not mean, necessarily the value of the land resumed but the value together with the amount of damage he has sustained by the loss of the land". ⁵ It follows from these comments that whatever form the compensation payable might be in, it must be equivalent to the value of the property compulsorily taken from the dispossessed owner. By equivalent value it means that compensation payable is to be proportional to the material loss sustained and thus an equivalent of what is taken from the dispossessed owner. On the other hand, the principle of equivalence implies that the total sum payable in compensation cannot, and must not exceed the dispossessed owner's total loss. The dispossessed owner is not entitled to receive more than a fair compensation for the loss he has incurred nor be compensated on a basis which results in him being in a substantially better position than he was at the date of the taking. ⁶ The principle is very important because to do

. Ibid at p. 79.

. Ibid.

. Berger Paints & Myers v. Wellington City Council (1975) 1 N.Z.L.R. 184;

otherwise would be unfair on both the owner and the Government. Unfair on the owner to pay him less compensation than his entitlement, unfair on the Government which has been given the power to acquire land in the public interest.⁷

THE LANDOWNER'S RIGHT TO CLAIM COMPENSATION FOR COMPULSORY ACQUISITION

In PNG like in many other countries, a right to claim compensation for compulsory acquisition is a statutory right which acquisition statutes consistently guarantee. Generally, therefore, a person whose land has been compulsorily taken is entitled to claim compensation against the acquiring authority under a particular statute which authorises the acquisition. Before the land laws in PNG were amalgamated into the pre-independence Land Act 1962,⁸ compensation laws in PNG were governed by

Wm Collins & sons Pty. Ltd. v. The Co-ordinator General of Public Works, Land Ct., Brisbane, (1969) 22 Vol. 6 (April 1973) 457. In awarding compensation it is necessary, therefore, for all circumstances to be taken into account in order to determine what sum of money would place the divested owner in a position as nearly as possible to what he was in prior to the taking of his property. However, compensation is awardable only if losses sustained from the compulsory acquisition are not too remote. All items of loss must be shown to be rational and reasonable consequence of the acquisition. Speedy, S. L., op. cit., pp. 5 - 7.

7. However, it is maintained that although the enunciation of this fundamental principle is easy and its just is self evident its application is extremely difficult. Also it is not easy task to spell out general rules which will be applicable to all cases. Cf. Mizen Bros. v. Michan Urban District Council (Unreported) cited in Horn v. Sunderland Corporation (1941) 2 K.B. 26 for general rules which will be applicable to all cases.

8. This Act was adopted as an Act of Parliament at Independence, S. 20 (3) of the Constitution which was revised in 1982 and referred to in this work as the Land Act Chapter 185 (herein also the current Land Act).

different statutes. In Papua the laws were contained in the Land Ordinance 1911 - 40 and the Land Acquisition Ordinance 1914 (Papua).⁹ Although both legislations required that compensation shall be paid to the owner who had been deprived of his land by way of compulsory acquisition, the latter Act contained more comprehensive provisions than the former in that it set out the principles of determining compensation and the procedures for claiming compensation.¹⁰ In New Guinea, on the other hand, the Land Ordinance 1922-41 (New Guinea)¹¹ required that compensation must be paid to the dispossessed owner and the compensation to be assessed in the prescribed manner. The term 'prescribed manner' was not clearly defined in the Act, however, Part VIII of the Regulations of the Act set out procedures for the assessment of compensation in respect of land acquired under the Act.

The principal legislation in PNG which make provisions for compensation for compulsory acquisition today are the Land Act Chapter 185 and the Lands Acquisition Act Chapter 192. These two Acts declare in the first instance that "interest of every person", whether it be "an easement, a right, power, privilege or other interest in, over or in connexion with" the land the subject of the compulsory acquisition is effectively "converted into a right to compensation" on the date of the acquisition.¹²

9. See SS. 60 and 26 of the respective Acts. However, S. 60 provided that full compensation was to be paid for the reserved land.

10. See generally Part IV of the Act.

11. S. 71.

12. See S. 19 of the Land Act and S. 12 of the Lands Acquisition Act.

the two Acts also declare that notwithstanding anything in the respective Acts where land is acquired by compulsory process the National Court " may make such orders as it thinks proper for declaring or adjusting rights and liabilities in connexion with the land ". The Court can make any such orders only upon an application by either of the parties, that is, either by the State or by any person who has an interest in the land acquired.¹³ Thus, there can be no orders if there was no application and there appears to be no provision for the Court to make an order on its own initiative.

The Land Act goes further and provides that where customary land is compulsorily acquired, the powers conferred upon the National Court under this Act may be exercised by the Land Titles Commission.¹⁴ For the purposes of compulsory acquisition of and the powers in relation to customary land, the Land Titles Commission is the " court of competent jurisdiction ".¹⁵ Accordingly, the jurisdiction conferred upon the National Court under the Land Act with respect to compensation for compulsory acquisition of customary land is to be exercised by the Land Titles Commission.¹⁶ Any person whose land or interest therein taken is thus entitled to make a claim for compensation, naming the amount of compensation claimed before the National Court

13. See S. 22 (1) of the Land Act Chapter 185; S. 15 (1) of the Lands Acquisition Act Chapter 192. The specific nature of the orders which the Court is to make is spelt out in S. 22 (2) and S. 15 (2) respectively of the two Acts.

14. S. 22 (6).

15. See SS. 16 and 84 of the Land Act Chapter 185.

16. See S. 85 of the Land Act.

the Land Titles Commission, as the case may be. To do so he must follow the procedures set out in Part XI, Division 2 of the Land Act Chapter 185 or Part III, Division 1 of the Lands Acquisition Act Chapter 192, depending upon which of the two Acts authorises or permits the acquisition.

PRINCIPLES OF COMPENSATION FOR COMPULSORY ACQUISITION UNDER ACQUISITION STATUTES.

Acquisition statutes usually set out general principles or methods by which the amount of compensation payable to the dispossessed owner is to be determined. The Lands Acquisition Ordinance 1914 (Papua), S. 28, for instance, provided that when assessing compensation certain matters must be taken into account in order to determine what amount of compensation to be paid to the dispossessed owner.¹⁷ The first matter to be

17. As to the principles upon which compensation under this Ordinance is assessed, see Geita Sebea v. The Territory of Papua (1941) 67 C.L.R. 544; 15 A.L.J. 357. In that case certain lands which were leased to the Administration by the native owners were subsequently acquired by compulsory process under the Lands (Kila Kila Aerodrome) Acquisition Ordinance 1939. S. 3 of the Ordinance authorized compensation payable to be assessed in accordance with the principles of compensation under the Lands Acquisition Ordinance 1914. The High Court held that for the purpose of assessing the compensation payable in accordance with the provision of S. 3 of the Lands (Kila Kila Aerodrome) Acquisition Ordinance the land should be valued as on 1st January 1939, together with such improvements upon it as formed part of the land and such structures and buildings upon it as were permanently attached or affixed to it (such fixtures having become the property of the natives who were owners of the land) on the grounds that: (a) an estate in fee simple freed and discharged from all trusts and encumbrances was acquired by the Crown; (b) the provision of S. 3 of the Land Ordinance 1911 - 35 restricting free alienation of land by native landowners did not affect the value of the land in question; (c) a deduction should be made in respect of the leasehold interest of the Crown; and (d) no percentage increase should be allowed for compulsory acquisition.

ken into account is " the value of the land acquired; second, " the damage caused by the severance of the land acquired from other land of the owner " - the severed residue land; and third, " the enhancement or depreciation in value " of the severed residue land ... by reason of the carrying out of the public purpose " on the severed land. Any " enhancement or depreciation in value must be set - off against or added to the amount of compensation payable for the value of the land acquired and of the damage caused by the acquisition to the severed residue land.

S. 29 of the Ordinance provides for the date on which the value of the acquired land is to be determined. Where land is " acquired for a public purpose not authorized by a specific Ordinance " the value of the land must be assessed " according to the value of the land on the first day of January last preceding the date of acquisition ". However, it also provides that where land is " acquired for a public purpose authorized by a special Ordinance " the value of the land must be assessed in accordance with the " value ... on the first day of January last preceding the first day of the meeting of the Legislative Council in which the specific Ordinance was passed ".¹⁸ The section goes on and states that the assessment as to the value of the land acquired must be made " without

18. In the Geita Sebea case above it was established that the Lands (Kila Kila Aerodrome) Acquisition Ordinance did not specifically authorize a public purpose but the preamble states that the lands described in the schedules thereto are required immediately for the purposes of or connected with the Kila Kila Aerodrome. It was held by the High Court that the value of the lands compulsorily acquired under that Ordinance must be determined in accordance with S. 29 (1) (b) of the 1914 Lands Acquisition Ordinance. See per Williams J., at p. 558.

reference to any increase in value arising from the proposal to carry out the public purpose ”.

The current Land Act provides somewhat similar provisions as those of the 1914 Lands Acquisition Ordinance above. The provisions are contained in S. 88 of the Act which states thus:

- (1) In the determination of the amount of compensation payable in respect of land acquired by compulsory process under this Act, regard shall be had to-
 - (a) the value of the land at the date of acquisition; and
 - (b) the damage (if any) caused by the severance of the land from other land in which the claimant had an interest at the date of acquisition; and
 - (c) the enhancement or depreciation in value of the interest of the claimant, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.
- (2) In determining the value of land acquired under this Act, regard shall not be had to any increase in the value of the land arising from the carry out of or the proposal to carry out, the public purpose for which the land was acquired.
- (3) Where the value of the interest of the claimant in other land adjoining the land acquired is enhanced or depreciated by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired, the enhancement or depreciation shall be set off against, or added to, as the case requires, the amount of the compensation otherwise payable to the claimant.

The other acquisition legislation is the Lands Acquisition Act Chapter 192. The Act

contains provisions under S. 18, in relation to the principles by which compensation payable is to be determined. The provisions are completely different from those contained in the 1914 Lands Acquisition Ordinance and the Land Act Chapter 185.

S. 18 of the Act provides that where the acquired land is not developed, compensation payable is the "prescribed amount". The "prescribed amount" is an amount determined by the Valuer General who takes into account in accordance with S. 19 of the Act; "each class of land in the country; or ... different part of the country; or the use to which each class of land in the country or in different parts of the country is being put; or a particular parcel or ... parcels of land". Where the acquired land, however, has been either fully or partially developed for non-profit-making purposes such as residential or recreational purposes, compensation payable must be for "the product of the value of improvements, ... and the prescribed factor for the land". On the other hand, where the subject land has been either fully or partially developed solely for profit-making purposes, the determination of compensation otherwise payable can fall into either one of the following four categories.

First, "where at the date of acquisition, the acquired land has been in production for more than five financial years", compensation payable is subject to "the product of the average annual net profit received in relation to the land over the five financial years immediately preceeding the date of acquisition"... "and the prescribed factor for the land". Secondly, where the period of production exceeds one financial year but not exceeding five financial years, compensation payable is subject to "the product of the annual net profit that would have been received in relation to the land over a period of

“the financial years ” and “the prescribed factor for the land taken”. Thirdly, where the production period exceeds “ one financial year ” ... or ... “ five financial years immediately ” before the acquisition, but loss rather than profit is incurred, compensation payable is based upon the prescribed factor less “ an average annual net loss for the period that it has been in production ”. Fourthly, where the subject land has been in production for a period not exceeding one financial year or has not yet commenced production, compensation payable is based upon “ the product of the value of the improvements ” and “ prescribed factor for the land ”.¹⁹

The provisions of the 1914 Lands Acquisition Ordinance and the present Land Act clearly show that in PNG a person who has been dispossessed of his land by compulsory process is entitled to compensation. First of all he is entitled to recover compensation for the value of the acquired land at the date of acquisition. On top of this he is entitled to be compensated for any damage or loss caused by the severance of the land acquired to the severed residue land. He is further entitled to compensation for any depreciation in value of his interests in the severed residue land as a consequence of the carrying out of or proposed carrying out of the public purpose for which the severed land was taken. The compensation for damage or loss and depreciation is an additional compensation which must be added to that which is to be paid for the value of the land.

¹⁹ It is not my intention in this chapter to do anything more than the summary of the provisions of this Act, the Lands Acquisition Act Chapter 192, as I have already done. However, I will try and make a few comments as to the effectiveness of the provisions of the Land Act Chapter 185. The provisions of this Act are basically similar to the 1914 Lands Acquisition Ordinance.

The acquisition statutes also provide several qualifications to the dispossessed owner's right to claim compensation. The first is that the dispossessed owner's right to claim compensation is restricted to the value of the severed land and damage and/or depreciation caused to the severed residue land " at the date of acquisition " of the severed land. The dispossessed owner is therefore not entitled to be compensated for any increase in the value of the land taken subsequent to the date of acquisition as a consequence of the public work or proposed work for which the land was acquired. Neither is he entitled to compensation for any loss or damage caused by the severance of the acquired land or depreciation in value caused, by the public work or proposed work on the severed land, to the severed residue land after the date of acquisition. Another qualification is that the dispossessed owner is not entitled to compensation for any increase or enhancement in the value of the severed residue land as a consequence of the public work or proposed public work for which the severed land was acquired. Any such enhancement in value of the residue land is to be set off against the amount of compensation otherwise payable to the owner. This seems to imply that no compensation is payable to the dispossessed owner if enhancement in value exceeds the damage caused by way of severance.

PROBLEMS RELATED TO THE PRINCIPLES OF COMPENSATION IN THE ACQUISITION STATUTES.

The provisions of the statutes in relation to compensable and non - compensable

Interests of the dispossessed owner are ambiguous in several respects. The ambiguities are related to the following issues: (i) Compensation claims for past grievances, (ii) Compensation claims for economic and non - economic losses, (iii) Compensation claims for hardship or injured feelings, (iv) Compensation claims for scarcity value, and (v) Compensation claims for betterment or enhancement in the covered residue land. None of the statutes referred to above defines or spells out clearly whether or not, within the compensable interests, any distinction be drawn between whether a particular claim is worthy of compensation. It is also not clear whether any exception is to be made within the non - compensable interests to allow for compensation to be made under certain circumstances with a view to reaching an equitable settlement of claims. Adding to this ambiguities is the fact that there appears to be general lack of any clear Government policies for distinguishing among the various claims more worthy claims from less worthy ones and of what are to be regarded as compensable interests. This has been supported by a recent study which has revealed that there is currently no clear Government policy with respect to the central issues of what are to be regarded as compensable interests once property is acquired by compulsory process and how compensation levels are to be determined on the basis of the nature of the claims.²⁰

(i) Claims for Past Grievances.

The ambiguities in respect of the principles of compensation in the acquisition statutes

20. See Knetsch, J., and Trebilcock, M., Land Policy and Economic Development in

coupled with the inability of the Government to formulate clear and consistent policies with respect to these issues tend to encourage all kinds of claims for compensation. Among these claims are those made by people, not only for alleged injuries or loss caused by land recently taken by the Government but also for lands acquired during the colonial period. The latter is one of the major problems which is currently facing the country and is described as "acute and disruptive" issue in PNG today.²¹ Here people who have been aggrieved by the acquisition of their land in the past under the Colonial administration are now calling on the National Government to renegotiate with them with the view to making a claim for higher compensation based on the current value of the land.²² Although the specific nature of the claims or grounds for greater compensation may vary from case to case, the common arguments are usually based on the following:

- (1) the acquisition of lands in early colonial times with no or trivial payments usually in a form of a few trade goods;
- (2) unforeseen consequences of projects;
- (3) desire to gain a greater share of the real or perceived returns flowing from projects implemented on the land regardless of what rights may have been taken or voluntarily exchanged; and

PNG, Institute of National Affairs Inc. Port Moresby, 1981 pp. 92 - 101.

21. Trebilcock, M. J., and Knetsch, J. L., "Land Policy and Economic Development in PNG", (1981) 9 M.L.J. 1 & 2 pp. 102 - 114 at p. 112.

22. The claims, however, are not only as a result of the grievances caused by earlier pre - Independence acquisitions. They are also as a result of grievances caused by more recent acquisitions where inadequate compensation is alleged to have been paid to one group either by way of political favouritism or in response to the extortionate bargaining position of a group in a position to disrupt or obstruct a major project. See Trebilcock, M. J. and Knetsch, J. L., *ibid*.

(4) to the argument that compensation had been paid, but to a wrong group or people.

The claims for larger compensation to correct old wrongs or to make up for injustices of old takings resulting from lack of clear and consistent policies are causing a good deal of consternation and are discouraging the initiation of new development efforts. They also have the effect of weakening the enforcement of new agreements. For instance, if compensation payment made to remedy past injustices exceeds the compensation paid under the most recent acquisitions, the owners of land in the latter case would normally seek renegotiations of the transactions under which their land was taken with a view to demanding higher compensation. This, therefore, affects the enforcement of recent agreements. Further it is submitted that the settlement of these claims has proved to be unnecessarily costly to the Government. There appear to be two main reasons for this unnecessary cost to the Government. The first is purely a political one. That is, payments have been made because of political favouritism or to keep promises made by nationalist politicians who have taken advantage of the situation for electoral purposes by promising considerable ex gratia payments to the more demanding claimants irrespective of the nature of their claims. The other reason being that in many cases these compensation claims have often resulted in lengthy and expensive litigations with the Government especially where the Government opposes the claims because of the fear that to bow down to them would be to open a way for more claims. According to one writer, compensation payments to a few individuals for grievances caused by pre-independence acquisitions is a relatively "wasteful kind of expenditure,

serving nothing more than a symbolic purpose only".²³ It is, therefore, arguable as to whether the manner in which these claims are settled is in fact in the interest of greater equity as called for by the National Goals and Directive Principles of the Constitution of PNG.²⁴

Thus, without clear and consistent policies setting out guidelines or criterion for distinguishing the substance of the various claims and determining what are to be regarded as compensable interests, landowners, genuine or not, can be expected to demand higher compensation for not only alleged injuries or losses but also for values that have been created by the efforts of others on lands taken or sold by them years ago. This situation will unnecessarily drain on the nation's scarce resources which are desperately needed for development purposes. It will also make it extremely difficult for the Government to secure new lands for public purposes. Until such policies are introduced one possible solution to claims, particularly with respect to grievances caused by pre - independence acquisitions, seems to be to allow for renegotiations or pay compensation to only those cases where the claimants genuinely did not receive any form of payment whatsoever. All other claims including claims that payments were in effect made but to the wrong people or that past payments, whether it be in money or in kind, were trivial should not be allowed.²⁵

23. Sanders, K., " Compensation Scheme for Natives Land Claims ", Seventh Waigani Seminar, Port Moresby. (Copy held at UPNGLibrary.)

24. See Goal 2. pp. 2 - 3.

25. The former is because unless there is evidence to show that for some reason or

i) Claims for Economic and Non - Economic Losses.

Where land is acquired by compulsory means, the dispossessed owner suffers all kinds of losses. Some of these will be pecuniary; others may be non - pecuniary. Loss of sacred places, ancestral burial grounds, or loss of the landowners' attachments to specific land for reasons of particular traditions of the group or loss of kinship ties to others in the area are some of the prevalent examples of the latter. The values associated with land, therefore, go far beyond that of an economic commodity or an economically productive asset. The existence of these extra - market values may have the effect, *inter alia*, of increasing the resistance to dealings that reduce the land value and raising the level of compensation demand by the divested owners. The latter is due to the fact that, for reasons which have already been mentioned elsewhere in this work, money is seen as a poor substitute for interests acquired and dispossessed land - owners would correspondingly demand more of it to replace any loss sustained by them as a result of the acquisition.

Since the non - pecuniary losses cannot be measured by market prices, compensation payments purely based on such prices will result in a loss of economic welfare to the dispossessed owners. That is, compensation payment which fails to reflect the non -

other the land in question was acquired and compensation was paid in secret without the knowledge of the claimants who purport to be the true original owners, no claim is to be allowed. The latter is because the compensation made, however, trivial it maybe, or whatever form it may be in, was value of the land in question at the time of the acquisition. However, if there is sufficient evidence to show that the claimants were compelled by any means into accepting such payments then they may be excepted.

pecuniary losses would place the divested owners in a position far worst than the position they were in prior to the acquisition of their land. To avoid such a situation from occurring and to fully compensate the interests of the dispossessed owners in the land given up, the compensation needed to indemnify the owners must take into account the market values as well as non - market values of the losses associated with the interests taken. A useful demonstration of how compensation can be worked out in this case is provided by the compensation made by the Bougainville Copper Company to Panguna Landowners Association of the North Solomons Province for the land acquired for the copper mine as discussed later in this section. The normal means of assessing the economic value of the property taken will, therefore, result in compensation payments that will fail to fully indemnify the losses sustained by the dispossessed owners. This is in accord with the argument that a purely legal settlement to land or compensation claims in PNG will not work.²⁶ As was correctly noted in Re Wilson and the State Electricity Commission of Victoria:²⁷

in the cases of compulsory acquisition the value to the owner may, according to the circumstances, be proved in more ways than one, but a very common way is to base it upon, though not necessarily to confine it to, the market price ... In cases of compulsory acquisition, however, an owner may be able to show that the value to him is something more than such market price, and in such cases he may adopt one of two courses. He may either set out in detail all possible elements making up the value to him, or he may with regard to some incidental expenses and claims give general evidence indicating that a lump sum would be allowed in respect of a number of matters with relation to which it would be difficult or an unnecessary waste of time to go into details.²⁸

26. Sanders, D., op. cit., p. 12

27. (1921) V. L. R. 459

28. At p. 464. This passage has been cited in the Re Ratavul Land case, op. cit., at p. 83.

ilarly in the case of Spencer v. The Commonwealth of Australia²⁹ the High Court of Australia also noted that when dealing with the question of the loss sustained by the landowner dispossessed by compulsory acquisition:

his loss is to be tested by the value of the thing to him ... and the loss he has sustained is not necessarily to be gauged by what the land would realise if peremptorily brought into the market on a day named ... The value to the loser of land compulsorily taken is not necessarily the mere saleable value.³⁰

These authorities support the view that a person who has been dispossessed of his land by compulsory process sustains not only losses in the market value but also non-market value. He is thus entitled to be compensated on both grounds. The above authorities have been held to be applicable to the assessment of compensation in Papua New Guinea³¹ where landowners often regard land values as transcending the mere economic or market values of the land.

The compensation provisions of the acquisition statutes under consideration, however, are silent on this issue. There is no provision as to whether or not compensation payable for compulsory acquisition of land should cover non - pecuniary losses as well as pecuniary losses. There seems to be no definite Government policy on this issue either. However, a strategy that might be used to ensure that dispossessed owner's

29. (1907) 5 C. L. R. 418

30. See per Edmund Barton (Sir) at p. 435. This passage has also been cited in Re Ratavul Land case, op. cit., p. 83.

31. See Re Ratavul Land, (ibid), at pp. 82 - 85.

terests are fully indemnified would be one aimed at extending and further defining the various heads of claims. An approach which is consistent with this has been illustrated by the recent compensation agreement between the Bouganville Copper Ltd. and the Bouganville Landowners Association of the North Solomons Province for lands acquired for the mining site. Under the arrangement compensation payable includes compensation for (1) occupation, (2) physical disturbance, (3) social inconvenience, (4) bush loss (5) rivers and fish losses and (6) losses of crops and economic trees. Within these categories include such losses as damage to bush trees, severance of land, loss of traditional customs, and loss of recreational use of waters.³² It is important, however, to note that these categories of interests do not cover all losses that are occasioned by acquisition of the dispossessed owner's interests in land. They simply represent an ideal approach to setting out various categories of claims that could result in more orderly and equitable settlements of compensation claims.

iii) Claims for Hardship or Injured Feelings.

One question which needs to be looked at closely when deciding which losses are to be recognised as compensable losses is whether a dispossessed owner is entitled to be compensated for the hardship or injured feelings caused to him by the sudden and

32. Knetsch, J. and Trebilcock, M., Land Policy and Economic Development in PNG, Institute of National Affairs, Inc., op. cit., p. 95; See also Doble, K.W., "Compensating Customary Owners for Mining Development", Department of Minerals and Energy, Port Moresby, 1981 for the information on the computation of compensation payable under these various heads of claims for compensation.

compulsory nature of the acquisition. This question first arose in PNG in the case of the Rata vul Land.³³ In that case a piece of land known as Rata vul was compulsorily acquired for public purposes under S. 69 of the Land Ordinance 1922-41. S. 71 of the Ordinance provided that " compensation shall be paid for land acquired or resumed under S. 69 of this Ordinance " and nothing further was said about the principles upon which such compensation shall be assessed. The dispossessed owners protested against the acquisition on the ground that the resumed land was necessary to them and their descendants, and that there were other native - owned lands in the same locality which could be acquired without inflicting so great a hardship upon their owners as the hardship the present resumption was inflicting upon them. Accordingly, they sought compensation against the Administration for the hardship resulting in injured feelings or disappointment caused to them by the acquisition.

Phillips, C.J., while agreeing that the representations made by the dispossessed owners may be true, held that such representations were irrelevant in an arbitration for compensation such as this because once a resumption has taken place and while it stands, the inexorable fact is that no matter how harsh and ruthless the resumption may appear to be from the point of view of the dispossessed owners, such representations are of no avail because of the over-riding force of the Statutory power of resumption.

The learned Chief Justice went so far to say that within the compensation provisions of

33. ' Assessment/Compensation Court ' (1939) Unreported ' Judgement ' No. 206. This case is printed in Haynes, C.E.P., Land Law and Land Policy in PNG: Texts, Cases and Materials, (Part III), op. cit., pp. 78 - 85.

the 1922-41 Land Ordinance, " compensation in such a context does not include compensation for injured feelings or soreness or disappointment because of the overriding and compulsory nature of a resumption, but means compensation for the loss (perhaps one might call it the material loss) suffered by a person dispossessed by the resumption ".³⁴

A rule which was laid down in that case was that an arbitrator in such circumstances should not be influenced by the fact that resumption is a compulsory and peremptory proceeding. The mere fact that the land is compulsorily acquired must not be allowed to enhance or diminish the amount of compensation payable as against the acquiring authority or the dispossessed owner, whichever, the case may be.³⁵ In other words, the divested owner may make no special gain out of the mere fact that the acquiring authority " has to have " or has to acquire a particular piece of land of his, or because that piece of land has been taken from him in a compulsory and peremptory manner, nor may the acquiring authority make any special capital out of the fact that the dispossessed owner is forced and has no option but to part with his land because of the compulsory character of the acquisition.

There are several points to be noted in respect of the decision in this case. First, the decision quite clearly demonstrates a situation where compensation payable covered

³⁴. Ibid. p. 79.

³⁵. Ibid., pp. 79 - 80.

only the economic or material losses sustained by the dispossessed owners. Second, though the Australian Courts accepted non - pecuniary losses in Re Wilson and the State Electricity Commission of Victoria and the Spencer cases above, it appears that such losses had not been accepted as compensable interests by the Colonial Courts in PNG. The present courts should accept non - pecuniary as well as pecuniary losses sustained by the landowners as a result of the compulsory acquisition of their land. Third, the decision may well have reflected upon the policies of the Colonial Government which to a large extent, sought to protect its own interests more than those of the native landowners notwithstanding unambiguous statements made by successive Administrations beginning with Commodore Erskine as to their desire to protect the native land rights.³⁶ One reason for this could be that these successive Colonial Governments were not elected by the people of PNG. They derived their powers or authority to govern from Canberra so that they were answerable to Canberra and not to the native population through general elections. However, successive Governments in PNG have been elected and given a mandate by the people of PNG to protect their interests. The Governments, therefore, need to re-examine this issue of whether or not to compensate dispossessed owners for injured feelings or hardship caused by compulsory acquisition. Indeed because of the unique Papua New Guinea perceptions about land ownership and its values, as discussed elsewhere in this work, and in order to attain equitable settlement of claims, compensation payable must take into account any hardship caused to the dispossessed owners as a result of the

36. See the discussions on colonial land policies in Chapter 2 of this work.

assumption. To do otherwise would be to impose a large portion of the cost of public projects on the dispossessed owners of land by leaving them with real and uncompensated losses.

There is one very difficult problem with respect to assessment of compensation for non-economic loss to the dispossessed owners. This problem relates to the determination of the quantum of compensation payable. Although it may be easy to schedule or categorise various losses as a basis for determining the levels of payment of compensation, the difficult issue is the extent of the losses incurred by the owners. That is, it is difficult to ascertain the monetary value of these losses in order to decide what amount of compensation to be paid to the dispossessed owner. This means that inevitably some arbitrary decisions will have to be taken in any procedure to evaluate the value of the losses sustained. However, the strategy adopted in compensation agreement between Bougainville Copper Ltd. and the Panguna Landowners Association above appears to provide a useful guide to working out the quantum of compensation for non-economic losses or value of land.

The Bougainville agreement was signed in 1980 which covered the five year period from 1979 to 1984. The terms of the agreement provide for annual in advance compensation payments to be made by the Bougainville Copper Company to the customary landowners. Under the agreement the Company made annual compensation payment at a rate of K7.41 per hectare as "Bush Compensation" for damage or destruction of bush trees and other natural foliage, for interference with use

and enjoyment of bush lands, for severance of land, for loss of surface rights of way and hunting and other rights associated with the bush.³⁷ The amount of K10.00 per hectare was paid for " Physical Disturbance " in respect of land within the mining site which was actually physically being disturbed by the operations of the mine.³⁸ Compensation for " Social Inconvenience " was made at the rate of K15.00 per hectare per annum. This includes payments for nuisance, inconvenience, disturbance to ways of life, social disruption and loss of traditional customs resulting from the operations of the company.³⁹ A base annual payment of K151, 100 was made for the loss of fish and other marine creatures, for disturbance, inconvenience, and loss of customary habits and rights related to fishing in, general use and enjoyment of rivers.⁴⁰ In addition to the above heads of compensation, the company paid to the landowners an annual payment of 5 percent of the unimproved land value at a minimum rate of K5.00 per hectare.⁴¹

iv) Claims for Scarcity Value.

A further problem area which requires a clear and consistent Government policy is

³⁷. Doble, K. W., op. cit., pp. 7 - 8.

³⁸. Ibid., pp. 8 - 9.

³⁹. Ibid., pp. 9 - 11.

⁴⁰. Ibid., pp. 11 - 12.

⁴¹. See *ibid.*, pp. 5 - 7, for detail.

related to the scarcity value of the land taken. Where the acquired land possessed scarcity value, for instance, because of the nature of the particular lands or particular locality of the land or because of having unique or unusual resource endowments a question arises as to whether part of any subsequent value created upon the land as a result of the execution of the public work for which it was acquired be given to the dispossessed owners. That is to say, whether the expropriated owners should receive compensation in addition to the compensation for any losses suffered by the owners, even if they were fully compensated, to reflect a share of the scarcity value of their land taken. The provisions of the acquisition statutes cited above are specific in directing that no payment of scarcity values taken advantage of by public works is to be made to the dispossessed owners.⁴² For instance, S. 88 (2) provides that:

In determining the value of land acquired under this Act, regard shall not be had to any increase in the value of the land arising from the carry out of or the proposal to carry out, the public purpose for which the land was acquired.

The CILM appears to be in favour of this principle that no compensation be paid for scarcity value of the land taken. It recommended that when land is compulsorily acquired, any increase in price or value as a consequence of the execution or otherwise of public purpose for which the land was acquired be recovered by the Government for the benefit of the country as a whole. It should not be paid to private

⁴². It has been highlighted that despite this specific direction, in practice, it is not strictly adhered to. That is, some allowance for the value of the public work or scheme is reflected in the land appraisals and in the final compensation payments. See Knetsch, J. and Trebilcock, M. Land Policy and Economic Development in PNG, Institute of National Affairs, op. cit., p. 98.

individuals because it is the community which creates that increase value.⁴³ This is because land, as far as the Commission is concerned, has value according to the actual use made of it, the improvements put on it by work and money, and a reasonable rate for the value that people give to the possession of their land.⁴⁴ The dispossessed owners should, therefore, be compensated for use made of and improvements added to their land and an extra for the value they give to the possession of their land. Any increased value of land due to demand, etc. should pass to the Government for the benefit of the National Community as a whole, not to the dispossessed owners. Any compensation payments made contrary to this under the above circumstances was seen by the Commission as an unearned income to make a few rich at the expense of the majority and it strongly objected to it.⁴⁵

On the other hand, however, it could be argued that it is fair and just that dispossessed owners be compensated for the scarcity value of their severed land because it is in the interest of both fairness and efficiency to have compensation awards reflect the scarcity value of the land taken. This view is reinforced by the decision in In re Lucas and The Chesterfield Gas and Water Board.⁴⁶ In that case one of the issues which the Court

43. See the CILM Report, op. cit., pp. 141 - 143; Also see Ward, A., " The Commission of Inquiry into Land Matters 1973: Choices, Constraints and Assumptions ", (1983) 11 M.L.J. pp. 1 - 13 at p. 8.

44. See generally the CILM Report, Ibid., Ch. 10.

45. Ibid.

46. (1909) 1 K.B. 16.

If Appeal was asked to consider was, where land acquired by compulsory process possesses a special value or adaptability, is the owner entitled to have the special value or adaptability taken into consideration in the assessment of his compensation? The Court held that the owner is entitled to have that taken into account in his compensation. There is nothing strange or abnormal in this, except where the special value exists only for the resuming part or body (in which case any allowance to the owner of compensation for the special value that exists only for the resumer would be a violation of principle that the mere fact of resumption is not allowed to enhance the compensation for land resumed).⁴⁷ It must be noted that compensation in this case may not necessarily have to be based on the full scarcity value of the land as the dispossessed owners would benefit, directly or indirectly, from the scheme on the land, but at least some compensation be paid in order to arrive at equitable settlements.

The current official policy on this issue appears, however, to be ambiguous. According to the recent study conducted by Professors Knetsch and Trebilcock for the Government of PNG, what is not clear is whether or not any distinction is made between cases where the value is due in part to the scarce land factor and cases where the particular land used for the public scheme has no unusual or unique feature. In the case of the latter, because there would be other good substitutes available, there is no reason, whether legal or economic, for compensation payments beyond the loss of the interests in the severed land, irrespective of how valuable the scheme on the

47. See *ibid.*, per Fletcher - Moulton, L.J. at pp. 30 and 31. Cf. In re Smith and The Minister for Home & Territories (1920) 28 C.L.R. 513.

and might be.⁴⁸ In the former case, however, since there would be no good substitutes available, there is a valid reason to make payments over and above the value of other interests given up to reflect the scarcity value of the land taken.⁴⁹ To do otherwise would be to make the dispossessed owners pay or subsidise the cost of the public scheme on the land for which the severed land was taken while the real or other beneficiaries of the scheme would not be required to pay anything.

v) Claims for Betterment or Enhancement in the Severed Residue Land.

A further difficulty of current policy is that of determining an appropriate treatment of any betterment or enhancement in the severed residue land as a consequence of the public work or proposed public work for which the severed land was compulsorily taken. It is normally, but not always, the case that where land is compulsorily severed for a public project, the value of the owner's residue land or for that matter, the value of any land in close proximity to the public project for which the land the subject of the severance was acquired will be enhanced. The policy choice is whether or not to set off any enhancement in the value of the severed residue land against the compensation payable for the severed land.

48. Knetsch, J. and Trebilcock, M., Land Policy and Economic Development in PNG, Institute of National Affairs, op. cit., p.98.

49. Where there is any substitute available, the scarcity value of the land acquired would be limited to its advantage over the alternative site that could be used for the purpose. This will have a lot of bearing on the compensation payable. See *ibid*, pp. 99-100.

There appears to be a great deal of ambiguity in PNG on the issue. The predominant practice, however, appears to be to ignore any enhancement value in determining an initial evaluation of the acquired land and consequent compensation offer. This is done for two reasons. First, it is done to gain acceptance by the landowners of the compensation offer. Second, it is done so that if there is any dispute as to the compensation offer, it could be used in further negotiations and as grounds for resisting higher compensation claims generally. For instance, if the dispossessed owners reject the compensation offer made by the Government and demand higher payments, the value of the enhancement to the residue land can then be used to counter such demands.

The provisions of the Lands Acquisition Ordinance 1914, S. 28 (2) and the present Land Act, S. 88 (3) above, however, appear to be quite clear on this issue. They are specific in directing that compensation is not to be paid for any betterment or enhancement in the value of the residue land created by the public scheme or proposed public scheme for which the subject land was severed. Any such betterment or enhancement is to be set - off against the final compensation otherwise payable to the dispossessed owners. Again, as pointed out above, the CILM appears to favour this rule when it recommended that any enhancement in the value of the severed land or severed residue land as a result of the public project or proposed public project should, as far as possible, be recovered by the Government on behalf of the national community, not by private individuals - the dispossessed owners - because it is the

national community as a whole which creates that enhanced value.⁵⁰

The ground for setting off the value of the enhancement from the compensation due for the severed land is that the community should only be responsible for indemnifying the dispossessed owner's net loss. This seems to be in conformity with the principle that the users or beneficiaries of the public scheme pay for at least part of the cost of the public scheme on the land taken. However, the argument against this principle is that with such a policy the dispossessed owners end up paying for benefits received from the public scheme whereas other beneficiaries of the scheme who have had no land taken pay nothing.⁵¹ This is not a fair policy. A better policy seems to be to either completely ignore any enhancement in value of the residue or reduce the value of the enhancement to be set off to be proportionate with the benefits accrue to the dispossessed owners from the scheme, notwithstanding the fact that in the latter case the dispossessed owners will still be paying something for their share of the benefits.

THE MARKET VALUE CONCEPT OF COMPENSATION.

The next issue to be dealt with in this section is whether or not compensation payable to the dispossessed owner be based upon the market value of the land taken. In many

50. See the CILM Report, op. cit., pp. 141 - 143. Also see Ward, A., "The Commission of Inquiry into Land Matters 1973: Choices, Constraints and Assumptions", op. cit., p. 8.

51. Knetsch, J. and Trebilcock, M., Land Policy and Economic Development in PNG, Institute of National Affairs, op. cit., p. 101.

countries which follow British common law system,⁵² compensation payment is usually based on market value of the property taken. In Australia, for instance, to determine the value of the land acquired the Courts apply the rule laid down by the High Court in the well known case of Spencer v. Commonwealth⁵³ which is the foundation of the modern law in Australia. The rule in that case was stated by Griffith C. J., when the High Court was called upon to consider on what basis the value of the land acquired should be assessed. He said;

The test of value of land is to be determined not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer but by inquiring 'what would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?'⁵⁴

The idea in the Spencer Principle seems to be that compensation payable to the dispossessed owner for the value of the land resumed must be such as that which the owner would have received if he had sold it in a free market. In other words, the amount of compensation payable must be one which would have been paid by a prudent purchaser, with the full knowledge of all the advantages and disadvantages and potentialities possessed by the land, and accepted by the vendor (owner), but neither

52. See Garner, J.F., "Compensation for the Compulsory Acquisition of Land: Some General Observations in J. F. Garner (ed.) Compensation for Compulsory Purchase: A Comparative Study, The United Kingdom National Committee of Comparative Law, London. 1975 pp. 3 - 11.

53. (1907) 5 C.L.R. 418.

54. Ibid, at p. 432.

of whom was compelled by or under any circumstances to do so. The ' Spencer Principle ' was approved and applied in PNG in Re Ratavul Land.⁵⁵

The important question is whether the PNG Governments which have been given the power to acquire land for public purposes should make compensation payments based upon the market value of the land taken? The provisions of the acquisition statutes, the Lands Acquisition Ordinance 1914 and the Land Act Chapter 185 and the Lands Acquisition Act Chapter 192, all seem to accept that compensation payments ought to be based upon the market value of the land compulsorily taken. But the CILM had a contrary view. According to the CILM, assessment of compensation for land and improvements based on the concept of a free market price or value is not appropriate for PNG. It rejected the argument that valuation of land and improvements should be based on prices which could be expected in a free market. This is because a free market does not exist in PNG where most land dealings are done through the Government, and foreign buyers are prohibited from dealing direct for land. In these circumstances the market value of land is low and there is no need to pay compensation on the assumption that a free market exists.⁵⁶ It is quite essential to the scheme both to conserve limited public funds and to enable the Government to buy back developed land by means of grants or loans from public finance and reallocate it to landshort Papua New Guineans at reasonable cost that the valuation of the land

55. See footnote 3.

56. See the CILM Report, op. cit., Ch. 10.

should not be a high figure based on market price. Otherwise it will place an artificially high value of the land and make it difficult for the people who receive the land to repay the loan.

The commission was in favour of the concept of compensation based on "unexhausted improvements" rather than market value. The term "unexhausted improvements" is meant anything or quality on the land directly resulting from the expenditure of capital or labour by the owner which improves the productivity of the land and which is still of use.⁵⁷ The Commission, therefore, recommended that where any developed freehold or leasehold land is acquired, compensation payable should be subject to the unexhausted improvements on the land. The dispossessed owners who lose developed land should be compensated for the unexhausted improvements on the land taken. Compensation payable for unexhausted improvements could be valued according to the usefulness or productivity of the improvements. Thus, economic trees, buildings and machinery could be valued in accordance with their economic life. That is, the amount of compensation payable is subject to the income earning potential and quality of improvements on the acquired land. This is important because the people who are allocated the lands subsequently will usually be required to pay the amount of compensation to the Government and will have to rely on the productivity of the property to do so.⁵⁸

57. Ibid, p. 145.

58. Ibid, Ch. 10. Also see Ward, A., *op. cit.*, pp. 8 - 9.

The Commission also recommended that where the property acquired is customary land, compensation payment should include firstly, an amount not exceeding \$50-00⁵⁹ per hectare for the land itself. Lower payments be offered for poorer land but the figures are to be reviewed from time to time to conform to inflationary trends in the country. Secondly, it should include the value of the exhausted improvements on the land such as crops, trees, buildings and fences. Thirdly, compensation be paid for the loss of gardening, hunting, fishing and important gathering rights over the land. Compensation under this category, however, is subject to whether or not these rights are actually being exercised. If not, no compensation is payable. Fourthly, compensation be made for the loss or disturbance of village life - style. Finally, in addition to the above, where the acquired land is used for a commercial enterprise, shares or an option to purchase shares in the enterprise be given to the dispossessed customary owners.⁶⁰ In essence what these recommendations provide is that where customary land is taken by compulsory means, the customary owners should be compensated not only for economic losses but also for non - economic losses sustained by the owners thereof, thus, support my own arguments earlier in this Chapter. If that is so then the compensation payment will obviously exceed the market value of the land taken. One could, therefore, assume that the CILM's recommendations against compensation based on the market value of the land taken by

59. The current exchange rate of one (1) Australian dollar to one PNG Kina stands at A\$1 = NGK0.6067. This exchange rate is taken from p. 11 of "The Australian", 23 / 9 / 86.

60. See the CILM Report, op. cit., Ch. 10. Also see Ward, A. op. cit., pp. 8 - 9.

compulsory process only apply to the acquisition of alienated or non - customary land. Where customary land is acquired, compensation payment would be over and above the market value of the land to coincide with the unique Papua New Guineans perceptions about land or rights over land.

The CILM's recommendations that compensation for compulsory acquisition of land should be less than market value is based on the argument that there is no free market in PNG. That is, the market value concept applies where there is a free market - where there are more than one buyer available so that the owner has to make a choice as to which one of them he should sell his land to and get the best price for it. This is not the situation in PNG because there is no free market and dealings in land is strictly controlled. The only buyer available is the Government. Apparently most of the land dealings is through the Government and the owners, therefore, have no other choice but to dispose of their land to the Government or through the Government. This affects the market value of the land acquired and, therefore, compensation payable to the dispossessed owner is less than its market value.

This issue first came up for consideration in the matter of Geita Sebea and Others v. The Territory of Papua.⁶¹ The facts of the case were briefly that in 1937 the Administration leased certain lands from customary owners in Port Moresby for the purposes of an aerodrome. The Administration, however, subsequently enacted a piece

61. (1941) 67 C.L.R. 544.

of legislation known as the Lands (Kila Kila Aerodrome) Acquisition Ordinance 1939 under which the subject lands were acquired by compulsory process. The dispossessed native owners demanded compensation based on market value of the lands. S. 3 of the Lands (Kila Kila Aerodrome) Acquisition Ordinance authorized compensation for the land to be determined under the Lands Acquisition Ordinance 1914. By S. 3 of the Land Ordinance 1911 - 35, natives were prohibited from disposing of their land except to the Crown.

One of the issues which the High Court was called upon to decide upon was whether the provisions of the Land Ordinance 1911 - 35 restricting the right of the natives to sell or otherwise deal with the lands affected the value of the lands in question or whether the fact that the Crown was the only possible purchaser in the first instance affected the value of the lands acquired. The Crown argued that the restriction imposed by the Land Ordinance must be taken into account as a factor, as the natives could not sell. It must, therefore, affect the value of the lands or the amount of compensation otherwise payable. It also argued that the Crown was the only purchaser in this instance. The amount of compensation payable is fixed at what a willing purchaser would pay, and under the circumstances neither party must be considered to be driven into the bargain. Since the Administration was the only purchaser in the first instance, what it was willing to pay by way of compensation was less than the market value of the lands taken and it must be accepted by the owners. The dispossessed native owners, on the other hand, argued that the prohibition against alienation imposed by the Land Ordinance was applied for the benefit of the natives alone and cannot be used to decreased the value

of the land. Also they argued that the Crown was the only buyer in the first instance, and it is a reasonable assumption that the Crown as a buyer would always pay the fair market price of the lands acquired. The dispossessed owners, therefore, were entitled to full compensation based on the market value of the acquired lands.

The High Court accepted the arguments of the dispossessed native owners and held that the provisions of the Land Ordinance restricting the rights of the appellants (dispossessed native owners) to sell or otherwise deal with the land did not affect the value of the lands taken or compensation payable for that matter. With respect to the argument that the Crown was the only possible purchaser, the Court held that the fact that the Crown was the only purchaser in the first instance would not affect the value of the lands. The Crown in this case would, therefore, pay the price that would be paid by a willing purchaser to a willing vendor in a free market where there are several possible purchasers. In so holding, the Court followed the Privy Council decision in Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagopatam⁶² where it was held that "even where the only possible purchaser of the land ... is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain ... the price that would be paid by a willing purchaser to a willing vendor of the land ... in the same way as he would ascertain it in a case where there are several possible purchasers ...".⁶³

62. (1939) A.C. 302.

63. Ibid, at p. 323. The same passage is also cited by Phillips, C.J. in Re Ratavul Land, op. cit., at p. 82.

The Geita Sebea case supports the provisions of the acquisition statutes which provide that the dispossessed owners ought to receive compensation on the basis of the market value of their land acquired by compulsory means.⁶⁴ My own arguments earlier demonstrate that the dispossessed customary landowners ought to receive compensation over and above the market value of their land taken. The CILM appears to support these arguments where customary land is compulsorily acquired. However, where non - customary land is compulsorily acquired, it recommended against the payments of compensation based on the market value as it is too generous to the dispossessed owners, but unfair to the Government which has to acquire alienated lands for public purposes, especially for dealing with land shortage problems in the country. Accordingly, it recommended that compensation payable should be less than the market value, that is, it should be based on the unexhausted improvements on the land acquired by compulsory means.

The reality of the matter, however, is that at this stage, the country's economy is such that it cannot afford to make high compensation payments for lands acquired for public purposes. This seems to be in accord with the CILM recommendations. However, it is in the long term interest of the country that the dispossessed customary owners must be fairly compensated in order to reach equitable settlements of the compensation claims. Otherwise the country will continue to face the same problems of people making all

64. The provisions of the relevant acquisition statutes are cited in the section on the principles of compensation earlier in this chapter. S. 88 of the current Land Act requires compensation to be paid, among other things, for the value of the land taken which is basically the market value of the land.

kinds of claims for compensation not only for economic losses but also non - economic losses which, among other things, affect new development efforts and make it difficult to enforce existing agreements or secure new agreements as discussed earlier in the chapter.

THE CONSTITUTION OF PNG AND THE QUESTION OF COMPENSATION.

The problems of taking land by compulsory means, in PNG seem to centre largely on questions of what would constitute an appropriate compensation. The PNG Constitution sets down a standard upon which compensation payable to the dispossessed owner is to be determined. The Constitution, S. 53, provides generally that where land is compulsorily acquired, compensation payment to the dispossessed owner must be based on the standard of " just compensation " on " just terms " .

What is meant by the expression " just compensation " on " just terms " is not defined by the Constitution.⁶⁵ However, the question as to what is meant by the term " just term "

65. S. 24 of the Constitution, however, provides for certain materials that can be used as aids to the interpretation of the provisions of a constitutional law. Such materials include the official records of debates, votes and proceedings in the pre - Independence House of Assembly on the Final Report of the Constitutional Planning Committee and on the draft of this Constitution. In addition, any relevant papers or documents tabled in the Parliament in connexion with those debates, votes and proceedings may also be used. See also S. 39 which provides for additional materials which could be used, although they are to be used as aids to ascertain what is meant by the phrase " reasonably justifiable in a democratic society " .

arose in the case of Frame v. The Minister for Lands, Surveys and Environment.⁶⁶ In that case a plantation land owned by Mr. Frame, the appellant, was compulsorily acquired under the provisions of the pre - revised Lands Acquisition Act 1974 (herein the Lands Acquisition Act Chapter 192) in accordance with the Government's Plantation Acquisition Scheme for the purposes of redistribution to the original customary owners. The Minister for Lands determined the compensation for the acquired property. However, the appellant appealed against the compensation determined by the Minister complaining that the compensation was quite inadequate because the Valuer General who valued the property did not approach it in a professional manner or apply valuation principles in his valuation. As a result the property was under - valued, especially in the light of the vast improvements achieved, current high coffee prices, the demand for the appellant's coffee, and so on, which was likely to continue than not.

The Court was asked to decide whether the compensation determined under the above circumstances can be said to be based on " just terms " under S.53(2) of the Constitution. It held, while allowing the appeal, that the amount of compensation awarded to the appellant cannot possibly be termed as just compensation based on " just terms " ; it was ' palpably unjust '. The term " just terms " in S. 53(2) of the Constitution " involves full and adequate compensation for the compulsory taking ".⁶⁷

66. (1979) P.N.G.L.R. 626.

67. The Court in this instance applied the statement of Latham C.J. in Johnson Fear & Kingham v. The Commonwealth (1943) 67 C.L.R. 314, at p. 323.

The compensation awarded in this instance cannot be said to amount to ' full and adequate ' compensation because the Valuer - General did not value the property by applying the recognized principles of valuation (he under - valued the property in question) especially bearing in mind the excellent results achieved by the appellants, his many improvements and the efficiency of the whole operation.⁶⁸ " How can there be just terms unless the exercise " (valuation exercise) " is approached, in a professional way, by experienced men? ".⁶⁹ Thus, according to the court " just terms " means full and adequate compensation to the dispossessed owner, that is, the divested owner in that case was entitled to compensation of the market value of his property compulsorily acquired.

In Australia, S.51(XXXI) of the Australian Constitution allows the Federal Parliament to acquire land by compulsory means on " just terms from any State or person for any purpose in respect of which the Parliament has power to make laws ". It was noted that this provision has been construed widely by the Courts in Australia to mean not merely the market value of the properties acquired, but also to mean that compensation payments to the dispossessed owner must be " full, prompt and effective ".⁷⁰ A similar

68. For the recognized principles of valuation which are to be adopted by the Valuer - General when valuing property under such circumstances, see p. 634 of the case.

69. At p. 632.

70. Goldring, J., The Constitution of PNG: A Study in Legal Nationalism, The Law Book Company Limited, Sydney, 1978 p. 211. Here one sees Goldring citing the cases of the Minister of the Army v. Parbury Henty (1945) 70 C.L.R. 459; Nelungaloo Pty. Ltd. v. Commonwealth (1948) 75 C.L.R. 495; Bank of New South Wales v. Commonwealth (1948) 76 C.L.R. 1.

construction of S.53(2) of the PNG Consitution is not likely. This is because of the operation of the later part of Subsections (2) and (3) of S.53 which appear to require that the compensation payment to be made must be consistent with the National Goals and Directive Principles, and with any national interest which the Parliament may have expressed on the subject. In addition, any fair provision made to defer payment, make payment by instalment or pay compensation must not be deemed not to be just compensation on just terms. These requirements qualify the dispossessed owner's rights to just compensation under S.53 of the Constitution.

The expression " just compensation " may receive different interpretations in different countries. In the United States alone, for instance, it has received different interpretations according to the laws and cases decided in the various States.⁷¹

" Just compensation " does not mean that compensation payments will be made for every loss incurred by the dispossessed owner when land is compulsorily acquired.

There are two point of views on this.⁷²

One point of view is that every attempt on the part of the acquiring authority to establish the value of the land compulsorily taken is an attempt to arrive at just compensation. In the State of Louisiana v. Crocett,⁷³ just compensation was defined by the Court of

71. See Lawrence, G., Condemnation: Your Rights When Government Acquires Your Property, Oceana Publications, Inc., New York, 1967 pp. 16 - 18.

72. Ibid.

73. 131 S2d 129.

Appeals of Louisiana. In that case the State Highway Department acquired land upon which stood a commercial rental building. The Court of first instance refused to allow the owner to show the rental value of the building. By excluding this piece of evidence, just compensation for the dispossessed owner was interpreted by the Court to be the value of the land as if vacant. The appellate Court, however, overruled the decision of the lower Court and defined just compensation to mean generally market value, that is, a price which would be agreed upon at a voluntary sale between an owner willing to sale and a purchaser willing to buy. The conclusion is, therefore, inescapable that the testimony contended by the defendants and excluded by the Court below from its consideration as pertains to the income or rental value of the property was material and relevant to a determination of the value of the property acquired and consequently there was no just compensation under the circumstances.

The other point of view as to what is meant by just compensation has been demonstrated by the case of the National City Bank v. United States.⁷⁴ In that case the United States Navy, acting under war powers granted by the Lever Act at the time of the First World War, acquired 20,000 bags of coffee. The purpose of the Lever Act was to obtain supplies for the armed forces. It was maintained by the Government that the owner of the coffee was entitled to only costs and five per cent profit. The Federal Court, however, rejected this contention and in so doing held that not only is market value the measure of just compensation but it must be the value in a free market. Prices

74. 275 F. 855, 859.

prevailing in a market which is not free are not a measure of just compensation. The Court went further and held that when the United States Government itself acquired property, it was bound to award just compensation and what is just compensation under the Constitution is determined by the same legal principles in war as in peace. Adopting the principles stated above, the evidence shows clearly that there was a free market; not a large or comprehensive market, but nevertheless a substantial trading sufficient to characterize a free market. Thus, to award only cost plus five per cent profit as contended by the Government would fall short of meeting just compensation.

It appears that according to the court in the Crocett case just compensation means compensation must be based on market value of the property taken. Market value is the measure of just compensation. So long as the acquiring authority has made every attempt to ascertain the value of the land taken and assess the compensation accordingly then it is sufficient to amount to just compensation. The question as to whether or not there is a free market is immaterial. On the other hand, according to the Court in the National City Bank case just compensation does not simply mean compensation must be based on market value of the acquired property but also it means value in a free market. Thus, the question as to whether or not there is a free market is very important because without a free market there can be no just compensation, no matter what attempts have been made by the acquiring authority to establish the value of the acquired property and determine compensation payable. The former view is a sound one because it seems to be consistent with the prevailing practice in PNG where the Government takes all necessary steps to establish the

losses sustained by the dispossessed owners and makes payments accordingly in accordance with what it considers is a just compensation under S. 53 (2).

It is abundantly clear from the above authorities that, although there may be differences in the interpretations given to the expression just compensation or just terms by the Courts in different jurisdictions, they all seem to accept that just compensation or just terms means that compensation payments to the dispossessed owner must at least be based on the market value of the acquired property.

Compensatory Rights of Non - Citizens under S. 53.

It needs to be noted that in PNG the constitutional guarantee in S. 53 (2) of just compensation to be made on just terms to the divested owner does not affect all persons who have been dispossessed of their properties. The provision of S. 53 (2) only affects citizens of PNG; it does not affect non - citizens. This is because the operation of S. 53 is only designed to protect the interests of automatic citizens since Independence or non - automatic citizens five years after Independence.⁷⁵ It is, therefore, only the citizens are entitled to benefit S. 53 (2) provision of just compensation on just terms in the event of their property being compulsorily acquired, except that non - automatic citizens were denied this benefit for the first five years after Independence. Non - citizens who are dispossessed of their lands or properties by

75. See S. 68 (4) of the Constitution.

compulsory process are, therefore, not entitled to receive just compensation as stipulated by S. 53 (2) of the Constitution. This is supported by Subsection (7) of S. 53 which clearly states that the just compensation rule does not apply "to or in relation to the property of any person who is not a citizen and the power to compulsorily taken possession of, ... the property of any such person shall be as provided for by an Act of the Parliament".

This provision of S. 53 (7) of the Constitution can be seen as an expression of the nationalistic spirit of the National Goals and Directive Principles of the Constitution which seek economic self - reliance for PNG.⁷⁶ It reflects in the policies of the successive National Governments since 1972 to acquire properties, especially lands, owned by non - citizens for the benefit of citizens especially the former customary owners, and without the same measure of compensation as would be paid to citizens.⁷⁷ The constitutional standard of just compensation, therefore, only applies to the citizens of the country. Non - citizens property owners have no such right under the Constitution so that if they are dispossessed of their properties, they are left at the

76. Before 1973 when PNG became a self - governing nation, 68 % of the country's formal economy was in the hands of foreign investors. Since 1973 there has been a shift in the emphasis on economic development in order to give PNG citizens a greater share in the economic development of the country which is in accord with the National Goals and Directive Principles of the Constitution. See Posman, K., "Expropriation of Private Foreign Investment: What is 'Adequate' Compensation" (1982) 10 M.L.J. 1 & 2 pp. 14 - 45 at p. 39. Also see Ottley, B. L., "Legal Control of Foreign Investment in PNG", (1976) 4 M. L. J. 2 pp. 147 - 183; Fingleton, J. S., "Land Policy in PNG" in Weisbrot, D., Paliwala, A. and Sawyerr, A. (ed.) Law and Social Change in PNG, Butterworths, Sydney, 1982 pp. 105 - 125.

77. Goldring, J., op. cit., p. 211.

mercy of the relevant acquisition statutes under which the acquisitions are being carried out. That is, they are only entitled to compensation in accordance with the provisions of the particular statute under which their properties are compulsorily acquired. This is in accord with the CPC recommendation " to give the Government of the day sufficient flexibility to deal with the acquisition of foreign - owned property and payment for it in an appropriate way, according to the particular circumstances with which it is faced ".⁷⁸ The present Lands Acquisition Act is a good example of the kind of legislation which is envisaged in S. 53 (7) and which gives the Government the flexibility necessary to deal with foreign - owned properties as discussed above.

Perhaps the important question here, however, is that if the non - citizens are not entitled to the constitutional yardstick of just compensation for the acquisition of their property then what should be the standard upon which dispossessed non - citizens can base their claims for compensation? This question was analysed by the Supreme Court of PNG in the case of Minister for Lands v. Frame⁷⁹ on appeal from the National Court. The land in that case was acquired under the pre-revised Lands Acquisition Act 1974, the dispossessed owner in that case, Mr. Frame, was a citizen, and as such there was no dispute as to his right to just compensation under S. 53 (2) of the Constitution. However, disputes arose with respect to the determination of the quantum of compensation. Although it was a matter concerning the compensation claim by a

78. The CPC Report, op. cit., p. 5 / 1 / 15.

79. (1980) P.N.G.L.R. 433.

citizen, the Court took time to analyse the position of non - citizen owners of property who may fall victims of the Act.

The Court presided over by three judges, Kapi, Pratt and Greville - Smith, JJ., attempted to develop a compensatory standard from the principles of assessing compensation in S. 19 of the Act.⁸⁰ The Court was divided on the issue. According to Pratt J., compensation payment to the dispossessed non - citizen under the Act means the " full money equivalent of the things of which he has been deprived ".⁸¹ His honour, therefore, was of the opinion that the dispossessed non - citizen property owner is entitled to compensation based on the full market value of his property on just terms under S. 19 of the Act. However, the other two judges, Greville - Smith and Kapi, JJ., provided a contrary interpretation. Their honours concurred in holding that a non - citizen who is dispossessed of his property under the Act is to receive compensation only as prescribed by the Act itself. That is to say, he is only entitled to receive the money value of his property due " to him in accordance with the machinery provided in S. 19 of the Act " because " S. 16 of the Act precludes the concept of just terms under S. 53 of the Constitution being read into the Act ".⁸²

The majority was of the opinion that the compensatory standard in S. 19 for non -

80. S. 18 of the current Act is the equivalent of S. 19.

81. Op. cit., at p. 485.

82. Ibid, at p. 434.

citizens whose property has been acquired is the money value of the property due to them. The question of just terms does not apply because of the operation of S. 16 of the Act. Presumably, their honours considered that this standard is one which is less than just compensation as provided in S. 53 of the Constitution. On the other hand, the minority opinion was that the non - citizens who have been divested of their property under the Lands Acquisition Act are entitled to compensation based on the full market value of their property on just terms under S. 19 of the Act. It may be arguable but with due respect to the opinion of Pratt J., the opinions of Greville - Smith and Kapi JJ., appear to be consistent with the policies of the successive post - Independence Governments which are attempting to restructure the society by acquiring foreign - owned properties with appropriate payments and give them to nationals in order to balance the economic imbalance between Papua New Guineans and foreigners created during the Colonial Administration.

COMPENSATION IN KIND.

The definition earlier on in this chapter defines compensation as meaning 'the equivalent in value of the property taken but not necessarily in money'. It is appropriate in this chapter to briefly examine what should comprise in the compensation payments to the dispossessed owners. One possible strategy that might be used is to explore the possibilities of replacing land interests given up in the acquired land with compensation in kind rather than in money or at least part of it.

A good example would be an offer of an alternative land in lieu of money as compensation to a claimant. In the case of land required for public purposes, compensation in kind by the provision of alternative blocks of land, may sometimes be seen as a superior substitute to money for the land given up and facilitate negotiations over the acquisition. Where an alternative land is so provided, it must be the equivalent in value and interest to the one compulsorily acquired.⁸³ A simple example is that of replacement of an equal entitlement to other land when land is compulsorily acquired. For instance, if five hectares of land are acquired another five hectares of equal value and proximity are turned over to the divested owners. The idea sound simple if there is any Government owned land nearby which could be used. However, if there is no such Government land available then it may be difficult to get land from other owners nearby to replace the one acquired. Nevertheless, even in this situation, there may still be some areas in which some flexibility in this direction may be possible.⁸⁴

The CILM recommended that where unimproved customary land near towns is acquired, government should avoid paying high prices for it. Instead it could offer to dispossessed customary owners, a number of blocks in the new development of conditional freehold or shares in commercial enterprises developed on the land as

83. Umeh, J. A., Compulsory Acquisition of Land and Compensation in Nigeria, op. cit., p. 39.

84. See Trebilcock, M. J. and Knetsch, J. L., " Land Policy and Economic Development in PNG " (1981) 9 M.L.J. 1 & 2 op. cit., p. 111, where the authors highlight some forward - looking bargaining strategies which could be used in order to avoid the Government being ' held up ' for extortionate amount of compensation.

inducements to sell. Although in theory the idea may sound simple in practice attempts to make payments in kind, in most instances, have not proved successful. This is demonstrated by the fact that according to one high ranking official from the Lands Department in PNG, when negotiating for compensation for compulsory acquisition of land, dispossessed owners in most instances do not like compensation in kind. They usually prefer hard cash or money compensation to compensation in kind. They even refused to accept part payment in money or vice versa.⁸⁵

This situation is true even if the compensation in kind is worth more than the cash payments offered. A very good example is offered by the case involving Rouna No. 4 and the Koiyari landowners outside of Port Moresby. In this case, the land was originally customary land owned by the Koiyari clan which the Government proposed to set up a hydro - electricity sub - station (Rouna No. 4). The Government in this case had offered to pay the landowners K20,000. It had also offered them alternatively six high covenant houses worth around K70,000 which they could either rent out or occupy them by themselves. The landowners opted for the K20,000 cash payment rather than the six high covenant houses which obviously worth more than the K20,000. The problem here is that they failed to see the cash value of the property or the houses in this instance which would have fetched them more than the cash amount offered if they were sold nor did they see the future cash flow if the houses were rented out. They

85. My informant in this case was Mr. Gerard Ovia, Assistant Secretary, Policy and Research, Department of Lands, Port Moresby.

preferred immediate cash payment to future investment.⁸⁶

Nevertheless, the idea is an important one at least in two respects. First, it would preserve the much needed public funds which could be used for development purposes that would benefit the entire country. Second, it would be in the long term interest of the divested landowners and the country that at least part of the compensation payment must be in kind. For instance, if shares in an enterprise on the land acquired are allotted to the divested landowners as part payment, this would not only help to ensure steady flow of income for the people in the future but it would also help to invest in the future of PNG. This is not to suggest that cash payments should not be made to dispossessed owners, especially customary owners. The argument that at least part of the compensation payable to the dispossessed owners should comprise of items other than cash, therefore, appears to be an ideal strategy and should be pursued by future policy makers, notwithstanding that such a policy might attract a lot of resentment amongst the divested landowners.

DISPUTE AS TO COMPENSATION PAYMENT.

It has already been mentioned earlier on in this chapter that where land is compulsorily acquired, the interests of any persons in the land are converted into a right to

86. Ibid.

compensation.⁸⁷ Those who have been deprived of their interests in the subject land are entitled to lodge a claim for compensation with the Government within the prescribed period naming the amount claimed by them. Any person who lodges a claim for compensation outside the specified period, it seems, has no right to compensation.⁸⁸

Where a claim for compensation is made, it is the Minister for Lands, on behalf of the Government, who considers the claim for compensation. The Minister may, after considering the claim, either accept or reject it. In other words, the Minister for Lands initially determines which claims shall be accepted for compensation and how much compensation will be paid in each case. The Minister, however, is required to notify the claimants within three months after the lodgement of the claim, as to whether or not he accepts the claim. Failure on his part to do so will be taken as an acceptance of the

87. S. 19 of the Land Act Chapter 185; S. 12 of the Lands Acquisition Act Chapter 192. The pre - 1962 Land Ordinances - the Land Ordinance 1911 - 40 and the Lands Acquisition Ordinance 1914 (of Papua) and the Land Ordinance 1922 - 41 (of New Guinea) - did not appear to contain similar provisions as the post - 1962 Ordinances.

88. S. 86 of the Land Act Chapter 185; S. 16 of the Lands Acquisition Act Chapter 192. Similar provision was contained in the 1914 Lands Acquisition Ordinance which enabled a dispossessed owner to lodge his claim for compensation with the Treasurer. However, whereas the former Acts require claims to be made within six months, the latter Ordinance required the time limit to be one hundred and twenty days or four months. On the question of time limits, see the discussions of the Papua New Guinean cases in the chapter on 'Procedures' above where the Courts held that they have an inherent power under the Constitution of PNG, S. 155, to extend time - limits placed by legislation.

claim by him.⁸⁹ The dispossessed owners who seek compensation are given right of appeal to the National Court if the acquired land is non-customary land or to the Land Titles Commission if it is customary land.⁹⁰ Where the Minister accepts the claim, he normally accepts only a reasonable claim or such parts of it as he thinks reasonable and rejects those part which he does not consider just. Where he rejects a claim or any part of it and, where he considers some compensation should be made to the claimants, he normally would make a counter offer.⁹¹

Where the Minister considers a claim to be reasonable and accepts it or any part of it thereof, the compensation payment to the divested owner can be determined.

However, if the Minister rejects the claim, the procedure to be adopted by the divested owner is as provided in SS. 87 and 17 respectively of the current Land Act and the Lands Acquisition Act.⁹² These provisions enable the owner divested of his land or

89. S. 86 (4) of the Land Act Chapter 185; S. 16 (4) of the Lands Acquisition Act Chapter 192. The three months time limit under this provisions has been extended to six months in the Land Law Reform Bill 1982 entitled Final Draft, Amalgamated Land Act, Land Law Reform, Drafting Instructions, Department of Lands, Waigani, October 1982 (herein Land Law Reform Bill (Final Draft) 1982), para. 12.1.2. See also S. 35 of the 1914 Land Acquisition Ordinance.

90. See Knetsch, J. and Trebilcock, M. Land Policy and Economic Development in PNG, Institute of National Affairs, op. cit., p. 19.

91. Compulsory Acquisition of Land: Determination of Compensation, Department of Lands, Surveys and Environment, Port Moresby (no date) pp. 5 - 6. This is a booklet written to familiarise those public servants working in related fields of the powers and procedures in compulsory acquisition of land. (Copy personally held.)

92. Similar provision is to be found in Division IV.3 of the 1914 Lands Acquisition Ordinance.

interest in the land to institute an action against the State in the National Court⁹³ seeking a declaration that at the time of the acquisition of the land he was entitled to the interest as specified in his claim. The Court may also be requested to determine the amount of compensation, if any, which is payable.

The National Court will make such orders as seems to it proper, after hearing the action, including a declaration that the claimant was entitled to the interest as claimed by him or that he was entitled " to some other interest " not being the subject of his claim, or a dismissal of the action. The Court's declaration will bind the State and all other persons who have interest in the acquired land. In the event where the Court had granted the relief sought by the claimant, compensation for the interest the subject of action is to be determined as if the claim has been accepted by the Minister. Where the Court makes a declaration as to an interest other than the one which was claimed, the claim will be deemed to be amended accordingly so that the claimant is to receive compensation for that other interest.

Where the claim for compensation has been accepted by the Minister or where the Court has made a declaration as to the existence of the claimant's interest as claimed

93. By S. 85 of the Land Act Chapter 185, it provides that for the purposes of compensation where the acquired land was customary land prior to its acquisition, the jurisdiction conferred upon the National Court is to be exercised by the Land Titles Commission with necessary modifications " and references ... to that Court " is to " be read as references to the Commission accordingly ". The 1914 Lands Acquisition Ordinance referred to the ' Central Court ' which was defined in S. 19 (2) (c) of the Ordinance Interpretation Ordinance 1911 - 40 as to mean the Supreme Court and references to the former Court were read accordingly.

by him in his action or of an alternative interest, the State and the claimant may agree on the amount of compensation which is payable.⁹⁴ An alternative to this approach is that instead of determining the amount of compensation to be paid in respect of the acquisition by agreement the State and the claimants may agree to refer the matter to arbitration.⁹⁵

Proceedings may also be instituted in the Court for determination of compensation to be paid in respect of the land or interest therein taken. S. 94 of the Land Act Chapter 185 enables the dispossessed owner, the claimant, to institute proceedings against the State in a Magistrate's Court, the National Court or in the Land Titles Commission if the land acquired was customary land. The claimant may do so under either of the following circumstances. He may do so where the Minister has failed to determine compensation payable within three months after the claim for compensation was lodged, or alternatively where the claimant has rejected an offer of compensation made by the Minister.

The present Lands Acquisition Act provides for claimants who are dissatisfied with the compensation determined by the Minister to appeal to the National Court. S. 22 of the

94. S. 91 of the Land Act Chapter 185. See also S. 37 of the Lands Acquisition Ordinance 1914. In some instances agreements can be entered into between the State and the owners of the land or interest therein as to the compensation payable to which the owner will be entitled prior to the subject land being compulsorily acquired. See S. 90 of the Land Act Chapter 185.

95. S. 92 of the Land Act Chapter 185. See also the Lands Regulation 1938 (of Papua) Schedule 2; the Land ordinance 1922-41 (of New Guinea), Regulation 26.

Act enables a dissatisfied claimant to appeal to the National Court against the determination of the compensation made by the Minister " within three months after the date on which a copy of the determination was served on him or such further time as the National Court allows ". The grounds upon which the appeal is to be based are firstly, that the Valuer - General's valuation of the improvements to the land is incorrect. Secondly, that the Valuer - General's determination of the average annual net profit which has been recieved, or that would have been recieved, in respect of the land is incorrect. Thirdly, that the ' prescribed factor ' used for the assessment of the compensation to be paid for the land or the improvements is incorrect. The appeal under S. 22 of the Act can be lodged on all or any of these three grounds.

The appeal by the claimant, appellant in the case of Frame v. The Minister for Lands, Surveys and Environment⁹⁶ against the compensation determined by the Minister exemplifies the situation in S. 22 above. The appeal in that case was based on all three of the above grounds; the claimant's counsel maintained that his client's property was under-valued as a result of an incorrect valuation of the improvements to the land acquired on the part of the Valuer - General. It was also maintained that the Valuer - General's determination as to the average annual net profit that has been recieved or would have been recieved in relation to the land was incorrect. Further, it was maintained that the ' prescribed factor ' used for the assessment of the compensation in that case was incorrect. This is particularly so in view of the vast improvements and the

96. [1979] P.N.G.L.R. 626.

efficiency of the whole operation in relation to the land acquired.

The Court allowed the first and third grounds of the appeal. By doing so, it held that the valuation of the Valuer - General as to the improvements was incorrect because he, the Valuer - General, did not use or apply recognised principles of valuation. The Court observed that because the Valuer - General failed to apply recognised principles of valuation, the figure he arrived at ignored improvements on the land.⁹⁷ On the question of the 'prescribed factor' the Court held that the factor which was used to assess the compensation in this case, a factor of four, was incorrect. Under the circumstances existing at the time of the acquisition of the property including, *inter alia*, the current high prices of coffee, quality of improvements to the land, the fact that the claimant's coffee was in great demand, being of very high quality and the "efficiency of the whole operation, which ... was a real 'going concern', more likely to improve than go downhill",⁹⁸ the 'prescribed factor' should be in excess of the four factor as used in this instance. Accordingly, the Court recommended a factor of a little over five in order to maintain justice to the dispossessed owner. The Court, however, dismissed the second ground of the appeal on the ground that the claimant rather exaggerated his claim. Thus, it accepted the determination of the average annual net profit made by the Valuer - General as presented.

97. Ibid., at pp. 633 - 635.

98. Ibid. at p. 635.

The right of the dispossessed owner to seek compensation for the acquisition of his land against the State is further strengthened by its recognition in S. 57 of the Constitution of PNG. S. 57 states that basic rights and freedoms of individuals including especially land rights contain in the Constitution " shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other Court prescribed for the purpose by an Act of the Parliament ". However, as we have already seen above, property right protected in the Constitution, S. 53, is only available to citizens of the country, though in the case of non - automatic citizens this right was denied to them during the first five years immediately after Independence. This does not mean that non - citizens who are subject to the compulsory acquisition power of the government are left unprotected. Their right to compensation can be enforced in accordance with the provisions of the particular legislation under which their property has been taken such as the Lands Acquisition Act.

Compensation is payable to the dispossessed owner who is claiming it as soon as he has established his title to the satisfaction of the Principal Legal Advisor.⁹⁹ However, if the landowner has failed to claim the compensation payable to him within six months after it was determined, the compensation can be deposited in the National Court.¹⁰⁰

99. S. 108 of the Lands Act Chapter 185. In the case of the Lands Acquisition Act Chapter 192, S. 33 requires persons entitled to compensation under that Act to establish their title to the satisfaction of the State Solicitor prior to claiming payments. In the case of the 1914 Lands Acquisition Ordinance, a similar provision was contained in S. 42 of the Act which required claimants to satisfy the Treasurer as to their title to the land taken before compensation was paid to them.

100. S. 109 of the present Land Act.

Compensation payable to the divested owner of the land or interest therein taken bears interest at the rate of three percent per annum in the case of land acquired under the current Land Act¹⁰¹ or five percent per annum where land is acquired under the Lands Acquisition Act.¹⁰² It is important that the compensation payments to the divested owners must be determined in accordance with the principles of compensation as discussed earlier in this chapter. In the case of citizens being divested of their property, compensation payable is to be based upon the constitutional yardstick of 'just compensation' as provided in S. 53 of the PNG Constitution. In addition, where customary land is compulsorily acquired, compensation payable is to take into account both non - economic as well as economic losses sustained by the owners in order to reflect on the extra - market values that they accord their land.

CONCLUSION.

Payment of compensation is one of the basic requirements of the exercise of the compulsory acquisition power. Compulsory acquisition of land cannot be deemed to be valid unless compensation payment is made to the dispossessed owner or owners (as the case may be) of the land taken. However, PNG presents a unique problem with respect to compensation issue in that different methods or standards will have to be applied in order to determine compensation payable depending upon whether land is

101. S. 111 of the Act. A similar provision may be found in the 1914 Lands Acquisition Ordinance, S. 41.

102. S. 33 of the Act.

acquired from citizens or non - citizens. In the former case, the standard is just compensation as provided by S. 53 of the Constitution of PNG. In other words, PNG citizens who are dispossessed of their land by compulsory process are entitled to receive compensation of the market value of the land taken in accordance with the Constitutional yardstick of just compensation. In the case of the latter, the standard to be applied is as provided for by a particular statute under which the acquisition is effected; not just compensation under S. 53 of the Constitution. As demonstrated by the majority decision in the case of Minister for Lands v. Frame,¹⁰³ this standard is one which is deemed to be less than the just compensation as provided in the Constitution.¹⁰⁴

Compensation payments to dispossessed citizen landowners, particularly customary landowners, must not only cover the market values of land. It must also cover non - market values to reflect extra - market values which they often give to their land with a view to achieving equitable settlement of compensation disputes. In addition, the dispossessed owners be compensated for the scarcity value possessed by the land taken and the value of any enhancement on the severed residue land must not be deducted from the total compensation payable. Otherwise the dispossessed owners will be required to subsidise the cost of the public scheme on the acquired land or to

103. [1980] P.N.G.L.R. 433.

104. The minority view, however, is that non - citizen property owners who are dispossessed by compulsory acquisition are also entitled to just compensation. See per Pratt J. at p. 484, 490 - 491.

pay for the benefits accrue to them from the public scheme whereas other beneficiaries of the scheme who have had no land taken pay nothing, which is not fair to the dispossessed owners of the land. This apparently means that compensation payments to the landowners who are divested of their land by compulsory acquisition will be over and above the market value or just compensation under S. 53 of the Constitution.

Although Papua New Guineans may be compensated over and above just compensation or market value, the current situation regarding compensation payments to correct injustices caused by lands acquired under Colonial Administration needs reassessment. This is because, as indicated earlier in the chapter, payments made in this case have encouraged more and more people all over the country to simply joining the queue by lodging all kinds of claims, whether genuine or not, for compensation thus contrary to essential development efforts by the Government. The general public attitude regarding this issue appears to be that payments under these circumstances are wasteful Government expenditure. The Government must, therefore, take into account this public attitude in an attempt to deal with compensation claims under these circumstances in the future.

CHAPTER SEVEN

RECOMMENDED REFORMS ON THE LAW RELATING TO COMPULSORY ACQUISITION OF LAND IN PNG.

INTRODUCTION.

As a result of the land acquisition policies since the colonial period, people in many parts of the country are now faced with land shortages. New measures were instituted at Independence to deal with these problems. However, the objectives of these measures cannot be realised if the successive post - Independence Governments of PNG continue to alienate land by compulsory process as their predecessors under colonial rule. In PNG today, the existing law allows for land to be acquired permanently and would be inconsistent with the scheme to resolve land shortages and other related problems. In other words, the post - Independence Governments cannot continue to permanently alienate lands from the people while at the same time trying to resolve their land shortage problems caused by colonial land alienation. Otherwise the Governments would destroy the objective which they seek to achieve under the Plantation (Alienated Lands) Redistribution and Unused State Lands Redistribution Schemes, namely, the objective of enabling Papua New Guineans to acquire, own and keep their lands, especially land short people.

Accordingly, an alternative procedure must be adopted to acquire land for public

purposes in the country. The new procedure must be one that will enable the Government to continue to take land for public purposes but without dispossessing citizens of their land. It must be one that will satisfy both the Government on behalf of the community and the landowners who are compelled to sacrifice their land for public purposes. In other words, the new procedure must be one that will recognize compulsory acquisition power of the Government but at the same time be consistent with the over - all policy of the successive post - Independence Governments to restructure the society by acquiring foreign - owned properties and redistributing them to Papua New Guineans for subsistence and/or economic development purposes.

Accordingly, this thesis proposes the following reforms to the law relating to compulsory acquisition of land in PNG.

COMPULSORY LEASES.

The power to take land compulsorily in PNG should be retained as it is essential to acquire lands the Government needs for development purposes in the public interest. However, an amendment to the provisions of the Land Act or an introduction of a new legislation is necessary to introduce a system of " compulsory lease " to replace the current system of compulsory acquisition. The basic difference between " compulsory lease " and the current system of compulsory acquisition is that in the former case land is not permanently alienated whereas, in the latter case the reverse true. This proposal

is extremely important in the context of the post - Independence Governments' effort to resolve the land shortage problems of Papua New Guineans. As discussed in Chapter 5, one of the main features of the 1982 Land Law Reform Bill (Final Draft) will be an introduction of a new procedure for land acquisitions to be known as " dedication ". This procedure will have the same effects as compulsory lease in that it will enable the Government to continue to secure land for public purposes with just compensation to the owners both at the same time without necessarily acquiring all the rights in the land. The principle under the new law will thus be that customary land which is required for public purposes should not be purchased outright, but should be " dedicated ". Dedication suspends all those customary rights which conflict with the public purpose for which the land is required. On the other hand, it allows customary landowners to continue to exercise such customary land rights which are not inconsistent with the public purpose over the land during the period of the dedication. As discussed in Chapter 5, once dedication comes to an end the land reverts to the customary owners and all customary rights therein will return.¹ The new procedure of dedication is a step in the right direction as it is not only in accord with the compulsory lease proposal in this work, but also it is in accord with the general Government efforts to resolve land shortage problems of the people in the country.

1. " Aim D " of the Final Draft, Amalgamated Land Act, Land Law Reform, Drafting Instructions, Department of Lands, Waigani, 1982. Also see the discussions in the previous chapters of this work.

COMPENSATION FOR COMPULSORY ACQUISITION OF LAND.

(i) Compensation Payments to Dispossessed Citizen Landowners Must Reflect Market and Non - Market Values of Land.

The payments of compensation to the dispossessed citizen owner should be over and above the market value of the land compulsorily acquired to reflect the extra - market values or non - economic values that Papua New Guineans often attached to their land. Otherwise the dispossessed owner would be left with real and uncompensated losses as a result of the acquisition of his land. In addition, the dispossessed owner should be compensated for the scarcity value of his land, especially where the subject land possesses an unusual or a unique feature, as there may not be any good substitutes available. To deny him compensation under the circumstances would be to impose a part of the cost of the public project on the dispossessed landowner. Furthermore, any increase in the value of the severed residue land by reason of the carrying out of the public scheme on the severed land should not be set - off against the total compensation due to the dispossessed owner for the severed land notwithstanding that the residual land benefits from such a scheme. The current policy under the Land Act² is that where the value of the residual land increases by virtue of the public scheme or proposed public scheme on the severed land such increased value is set - off against

2. S. 88.

the total compensation payable to the dispossessed landowner. This is not a fair policy because, as discussed in Chapter 6, with such a policy the dispossessed owner ends up paying for benefits received from the public scheme whereas, other beneficiaries of the scheme who have had no land taken pay nothing. The above proposals are quite significant in view of the Papua New Guineans' attitudes that see money compensation as a poor substitute for the loss of their lands and that they demand more of it to fully cover their various losses. Accordingly, the provisions of the Land Act be amended to reflect these proposals.

(ii) Compensation Payments to Dispossessed Non - Cittzen Landowners must be Less than Market Value of Land.

The payment of compensation to the dispossessed non - citizen landowner should be less than the market value of the land. This is because non - citizen landowners were the beneficiaries of the colonial system that had deprived the people (Papua New Guineans) of their lands and created a huge economic gap between foreigners and Papua New Guineans. If the post - Independent Government is serious about resolving the problems of land shortage of its people and bridging the economic gap created by the colonial system, at minimum cost to the public, then it must pay a dispossessed foreign landowner that compensation which it considers just. The notion of making compensation payment based on an amount which the Government considers just under the circumstances as demonstrated by the case of the State of Louisiana v.

Crocett,³ which is often less than the market value of the acquired land, thus appears to be a sound one and must be adopted as a major Government policy in dealing with acquisition and redistribution of foreign - owned properties in accordance with the Government's Land Acquisition Scheme. This is extremely important in two respects. First, it will save the country a lot of money which can be used for public purposes and second, it will enable the Government to avoid paying too much money to a few foreigners who are already rich at the expense of the masses. Otherwise the National Government would encourage the perpetuation of the status quo on the colonial system and at the same time place unnecessary burdens on the limited public funds.

It could be argued, however, that such a policy might affect Papua New Guinea's international image to the detriments of foreign investments and aids. On the other hand, it could be argued that adequate measures have already been taken legislatively under the National Investment and Development Authority Act and the Lands Acquisition Act to protect the interests of non - citizens. As discussed in Chapter 3, the former Act explicitly guarantees foreign investors that expropriation of their properties will only be effected in accordance with law, for a public purpose defined by law. It also guarantees them the right to remit overseas all compensation payable upon expropriation of property rights.⁴ The latter Act expressly guarantees that in the event

3. 131 S2d 129. For details see Chapter 6.

4. Schedule 5 of the Act.

of any compulsory acquisition of land compensation must be paid to the dispossessed owner in accordance with the principles of compensation set out in the Act.⁵ Apart from the legislation, a further measure instituted under the Plantation Redistribution Scheme to protect the property interests of non - nationals was that PNG approached the Australian Government under the scheme to provide funds to cover the difference between what foreign plantation owners could reasonably expect to get and what Papua New Guineans acquiring the property could reasonably be expected to pay. It was hoped that this would avoid damage to Papua New Guinea's international image or to the prospects of investment and aid initiatives. However, it appears that sufficient funds were not made available to implement the scheme at the level initially intended.⁶ Despite this the scheme still appears to exist. Finally, it should be pointed out that if dispossessed non - citizen property owners are dissatisfied with compensation as determined by the Government they have the right of appeal to the National Court to dispute the amount of compensation as such.⁷

5. S. 18 of the Act sets out the principles of compensation.

6. See Fingleton, J. S., " Land Policy in PNG " in Weisbrot, D., Paliwala, A. and Sawyerr, A. (ed.) Law and Social Change in PNG, Butterworths, Sydney, 1982 pp.105 125 at pp.110 - 115.

7. S. 22 of the Lands Acquisition Act Chapter 192. Subsection (1) of S. 22 sets out the grounds upon which the appeal can be lodged as follows:

(a) that the valuation determined by the Valuer - General for the improvements to the and is an incorrect valuation; and

(b) that the average annual net profit that was received, or that would have been received, in relation to the land, as determined by the Valuer General is incorrect; and

(iii) The Position Regarding Compensation Payments to Remedy Colonial Injustices to be Reviewed.

The situation regarding compensation payments to correct injustices caused by land acquisitions under the Colonial Administration should be reassessed. There is no provision made in the current Land Act nor is there any clear Government policy setting out the basis for dealing with compensation claims based on past grievances. Consequently payments have been made by the Government to remedy past injustices which have encouraged more and more of all kinds of claims, whether genuine or not, for higher compensation based on the current value of the land irrespective of who created the added value on the land. As discussed in Chapter 6, some of these payments have been made because of political favouritism or to keep promises made by nationalist politicians who have taken advantage of the situation for electoral purposes by promising ex gratia payments to the more demanding claimants or in responds to the extortionate bargaining position of a group in a position to disrupt or obstruct some major public project.⁸ This is a major problem facing the country at the moment and it has proven to be unnecessarily costly to the Government. Accordingly, an amendment to the current Land Act should be made or a separate enactment be

(c) that the Minister used an incorrect prescribed factor when assessing the compensation payable for the land or the improvements.

8. Trebilcock, M. J. and Knetsch, J. L., " Land Policy and Economic Development in PNG " (1981) 9 M.L.J. 1&2 pp. 102 - 114.

introduced which should specify as exhaustively as possible all compensable and non - compensable interests including those that have no direct market value. Until such move is taken one possible solution to compensation claims for grievances caused by pre - Independence acquisitions appears to be to entertain only those cases where the claimants genuinely have not received any form of payment whatsoever at all before. This does not include those cases where the claimants on their own free will elected not to be paid or receive compensation initially.⁹ All other claims including claims that compensation payments were in effect made but to the wrong hands or that past payments, whether it be in money or in kind, were trivial in view of the current value of the land should not be entertained. The former is because unless there is strong evidence to show that for some reason or other compensation for the land in question was made without the knowledge of the claimants who purport to be the true original owners, no claim should be allowed. The latter is because the compensation made, however insignificant it may be or whatever form it may be in, was the value of the land at the time of the acquisition. However, if there was sufficient evidence to show that the claimants were compelled by any means into accepting such payments then the claim be allowed.

9. Such cases often involve situations where landowners voluntarily made their lands available in the past for some public purpose such as a school or an aidpost without any payments but subsequently claimed compensation for them. This information is from my own knowledge of the matter.

PROCEDURES FOR COMPULSORY ACQUISITION.

(i) Time - Limits within which Landowners are to Respond to Notice to Treat.

The imposition of time - limit under the present acquisition legislation within which landowners are required to respond to a notice to treat is insufficient and should be extended. For instance, the Land Act imposes two months time - limit which will also be featured in the proposed Land Law Reform Bill (Final Draft) 1982. There are at least two main reasons why the extension of the time - limit is necessary. First, most of the customary landowners are in the remote rural areas with poor communication and transportation systems. Some of them may be scattered all over the country. Under the circumstances they might not be able to respond to the notice to treat prior to its expiry because the time - limit may be too short. Second, the acquisition of customary land often requires the consent of all or such of them after diligent inquiry can be ascertained.¹⁰ It would therefore require much more time than that which is specified in the Land Act in order to bring the notice of the intended acquisition to those to whom it applies. Accordingly, it has been proposed in this work that an amendment be introduced to extend the period of the notice to treat under the existing law to at least six months. Otherwise injustice may occur. Where the landowners fail to act in

10. S. 16(2) of the Land Act.

accordance with the notice to treat due to circumstances beyond their control, the courts in PNG reserve the discretion to extend time - limits imposed by statutes as demonstrated by the case of The State v. Giddings.¹¹ Also there are overwhelming authorities in PNG which show that the courts have constitutional powers under S. 155 of the PNG Constitution to review any act or omission of the Government which adversely affects an individual's interests, even where statutes seek to oust the jurisdiction of the courts.¹² Such discretion exists so that injustice may be avoided.¹³

(ii) Time - Limits within which the Government is to Complete the Acquisition.

Although the Land Act establishes a time - limit subsequent to the service of the notice to treat within which the landowners must respond to the notice, it does not set any minimum time - limit within which the Government must complete the compulsory acquisition. The Act, however, provides that acquisition is effected on the day

11. [1981] P.N.G.L.R. 423. For details of this case see Chapter 4.

12. See Reva Mase v. The Independent State of Papua New Guinea (Unreported) National Court Judgement (Interlocutory Judgement) 1/10/80, No. 260 at p. 3; Douglas Charles Dent v. Thomas Kavali (Minister for Lands) [1981] P.N.G.L.R. 488; The State v. District Land Court Ex Parte Caspar Nuli [1981] P.N.G.L.R. 192.

13. The State v. Giddings, op.cit., (footnote 11)

in which a notice of acquisition has been published in the Gazette.¹⁴ This means that months or years may elapse before the procedure for the acquisition is effected.¹⁵ Although currently there appears to be no problems caused by the absence of such time - limit, there is a potential for injustice to be done to the landowners. There appears to be no authority which would, in normal circumstances, enable the courts in PNG to compel the Government to decide whether or not to proceed with an acquisition without a lengthy delay. Also there appears to be no provision in the acquisition statutes nor is there any authority which would enable the landowners to seek any equitable relief or compensation in the event of any prolong delay thereof to complete the acquisition on the part of the Government once the notice to treat has been served. Accordingly, it is proposed here that an amendment to the existing legislation is essential with a view to imposing a time - limit subsequent to the notice to treat within which the Government must bring about compulsory acquisition of land. Alternatively, provision should be made to empower the court to compel the Government to complete the acquisition in the event of any unnecessary delay in completing the acquisition once the notice to treat has been served in order to do justice under the circumstances. The minimum time - limit in this instance should be six months which is sufficient for the Government to decide whether to proceed with the acquisition or not. If there is no

14. S. 17 of the Land Act.

15. See Duncan v. Minister of Education [1969] V.R. 362; Simpson Motor Sales (London) Ltd. v. Hendon Corporation [1964] A.C. 1088.

compulsory acquisition within the six months time - limit then at the end of the period the notice to treat should cease to have an effect immediately. Should the Government decide to take the land after the expiration of the six months period it must issue a notice to treat again. Finally, if the landowners suffer any loss or damage under the circumstances they should be compensated.

CHAPTER EIGHT

CONCLUSION

The history of compulsory acquisition in PNG goes back to the colonial period. The Colonial Administration did not always respect the land rights or interests therein of the indigenous people. On numerous occasions, however, pledges were made of the intention of the Colonial Administration to protect indigenous people in their land rights. These were empty promises as a lot of occupied lands were declared waste and vacant or ownerless and acquired without the payment of compensation. Investigations in most instances were hardly carried out prior to the acquisitions with a view to ascertaining whether lands were being occupied. In addition, land rights were confiscated as punishment for offences perpetrated or alleged to have been perpetrated by individuals and groups without compensation. Further, lands were taken through excessive pressure and/or force such as the famous Bouganville Copper mine case. These lands, as seen, comprised of some of the best areas in the country. The Colonial Administration's approach to acquisition of land in the country has firstly, caused insecurity with respect to indigenous land rights and secondly, it has resulted in the domination of PNG's economy, particularly plantation economy, by foreigners and thirdly, it has led to general shortage of land in many parts of the country. In the latter instance, the situation has been made critical by the recent population increase.¹

1. See the discussions in Chapter 2 above.

To prevent the repetition of the authoritarian nature of the colonial approach to land acquisitions through waste and vacant or ownerless declarations and other forms of forcible alienation and tackle the problems already outlined above, several important measures have been instituted since Independence. These measures include the protection of the land rights of Papua New Guineans in the Constitution of the Independent State of PNG and the adoption of new schemes to firstly, acquire and redistribute alienated lands, especially foreign - owned plantation lands, and secondly, redistribute unused State lands to original customary owners who are short of land or to other Papua New Guineans who are short of land in any area for subsistence farming or economic development purposes.²

However, the fact that these various measures have been taken to protect land rights of the people and resolve their land shortage problems in the country at the moment does not mean in any way that the post - Independence Governments of PNG will no longer take land by compulsory process from Papua New Guineans. Although the people may now be able to enjoy their land rights more than they ever did under the Colonial Administration, they may be required on occasions to relinquish their rights or interests therein to the State for some public purpose beneficial to the State. This is because the Government's power of compulsory acquisition is essential for the development of the society.³ Development programmes of the Government cannot be

2. See the discussions in Chapter 3 above.

3. See Lawrence, G., Condemnation: Your Rights When Government Acquires Your

effectively realised unless the Government has powers to compulsorily resume land. Unlike the situation in most other countries, much of the land in PNG is still owned by customary groups and therefore it is necessary for the Government to have compulsory acquisition powers to take land from the people in order to effect its development schemes in the public interest. It seems therefore that the people's enjoyment of their lands or rights and interests therein under the new measures instituted since Independence referred to above is only subject to this reservation of acquisition for public purposes. Otherwise a few people will hold the country to ransom to satisfy their own selfish interests at the expense of the nation or the public at large and consequently hinder development.

Although the Government may have power to acquire land compulsorily under the above circumstances, the power must be used cautiously and as a last resort. The post - Independent Governments of PNG should not take the same approach (the high - handed and misguided approach) as the Colonial Government in acquiring people's land because the latter constituted by foreigners who were more or less interested in securing their own interests. They gave less consideration to the land needs of Papua New Guineans and their descendants in the foreseeable future. They did not usually carry out thorough investigations to ascertain whether people had sufficient land for

Property, Oceana Publications, Inc., New York, 1967 Chs. 1-2; James, R.W., Land Tenure in Papua New Guinea, UPNG, Port Moresby, 1978 Ch. 4; Umeh, J. A., Compulsory Acquisition of Land and Compensation in Nigeria, Sweet & Maxwell, London, 1973, Ch. 3; Eccleston, M.J., "The Acquisition of Land in Papua New Guinea - A Changing Scene" (1975) *Management in PNG* (1) 1 pp. 39-46.

their present and/or future need or whether people who purported to have the authority to sell land did in fact have the consent of the landowning group to sell the land prior to the acquisition of land. The post - Independence Governments thus must take a more cautious approach so as to avoid maintaining the status quo.

There are good reasons as to why the post - Independent Governments must take a more cautious approach. First, failure to adopt a more cautious approach to acquisition of land would result in the destruction of the objectives which the Government hopes to achieve under the new schemes adopted at Independence, namely, to protect the land rights of the people and to help resolve their land shortage problems in the country. Second, the Government is likely to face strong opposition within its own ranks, especially from those Government members whose people are likely to be affected either directly or indirectly by the Government's action. Third, in order to secure electoral support the Opposition is going to attack every move the Government plans to take that will see the alienation of the people's land and the people, especially landowners, are more likely to support the Opposition's cause. It is going to be increasingly difficult for the Government to go ahead and effect acquisitions despite these pressures. Fourth, the Government will have to bear in mind the fact that it will have to meet the people again in the general election. If it wished to return to power and continue governing it will be compelled to make some concessions to these pressures or else it will commit political suicide.

It is important, however, to note that although individual landowners may be made to

sacrifice their land on occasions for community benefit, they must be properly compensated for their rights and interests therein given up. It has been argued in this work that in the event where land is acquired from citizens, the constitutional yardstick of just compensation to be paid to the dispossessed landowners must be observed. The compensation payments, however, must cover all losses sustained by the dispossessed owners as a result of the acquisition of their land. That is, payments must reflect non - monetary as well as monetary values which Papua New Guineans often attached to their land. Not only must the payments reflect monetary and non - monetary losses sustained by the landowners; they must also reflect unique Papua New Guinean attitudes that view money compensation as a poor substitute for the loss of their land in order to arrive at equitable settlements. Although citizens dispossessed of their land may receive compensation over and above the market value, the situation with respect to compensation payments made to correct past injustices requires urgent reassessment. This is because the public attitude appears to be that payments made under these circumstances are seen as serving nothing more than a symbolic purpose and a wasteful public expenditure, especially in view of the fact there are no clear guidelines for such payments.

Land rights of Papua New Guineans are protected in the Constitution of PNG; compulsory acquisition of land is not permitted unless it is for a public purpose.⁴

4. S. 53 of the Constitution.

Compulsory acquisition of land in PNG must therefore satisfy the criteria of public purpose. Apart from the requirement of compensation payments to dispossessed owners of land compulsorily acquired, the criteria of public purpose is a basic requirement of the power of compulsory acquisition and a pre - requisite to compulsory acquisition of land in PNG. In addition, where land is being acquired or proposed to be acquired compulsorily, the normal procedural requirements for compulsory acquisition must be observed. It would appear that failure to comply with the requirements of compensation, public purpose or the normal acquisition procedures would amount to an infringement of the individuals' property rights as protected in S. 53 of the Constitution of PNG. It would also appear that where any such infringements occur the courts or the Judiciary in PNG would invariably assert their inherent constitutional powers to review any act or omission thereof complained in order to do justice under the circumstances of each case notwithstanding any statutory provisions seeking to oust the jurisdiction of the courts as discussed in Chapter 4 of the thesis.

Finally, although the Government may continue to take land by compulsory acquisition for public purposes with appropriate compensation to the owners, it must be remembered that the circumstances in PNG today have rendered continue alienation of land under the existing compulsory acquisition law undesirable. This is particularly true in view of the problems of land shortage in many parts of the country, the increasing resistance on the part of Papua New Guineans in most instances to part with their land needed for public purposes and the over - all policy of the successive post - Independence Governments to resolve land shortage problems of the people in the

country. A new or alternative procedure is thus desirable to take land for public purposes. Accordingly, it has been proposed in this work that a new procedure of " compulsory lease " should be introduced to replace the existing law which permits permanent alienation of land. The new procedure will continue to enable the Government of the day to acquire land for public purposes but without divesting the landowners of the title to the land so that the land will revert to the owners at the end of the public scheme or if it is no longer needed for the purpose for which it was acquired. The new procedure of " dedication " in the Law Reform Bill (Final Draft) 1982 as discussed in Chapter 5 will have the same effect as the " compulsory lease " procedure proposed in this work and is a move in the right direction. It is hoped that compulsory leases would be acceptable to both the Government and the landowners in PNG because in most instances neither party can be a winner or loser under the procedure.

BIBLIOGRAPHY

1. Antoninus, M., " The Tolai Land Case " in Appendices (Part 1) to Land Tenure in PNG, UPNG, Port Moresby, 1976.
2. Black, H. C., Black's Law Dictionary (5th ed.) West Publishing Co., St. Paul Minn., 1979.
3. Brahe, D., " Compulsory Acquisition: From the Solicitors Viewpoint " in compulsory Acquisition of Land, Leo Cussen Institute for Continuing Legal Education (ed.), Melbourne, 1981 pp. 21 - 52.
4. Brown, D., Land Acquisition, Butterworths, Sydney, 1972.
5. Brown, D., Land Acquisition, (2nd. ed.), Butterworths, Sydney, 1983.
6. Brown, R., " Compensation for Expropriated Assets: Value or Justice, " Seventh Waigani Seminar, UPNG, Port Moresby (no.year.) (Copy held at UPNG Library.)
7. Burton - Bradley, B. G., " The Psychological Dimension " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.

8. Chalmers, D., " Human Rights and What is Reasonably Justifiable in a Democratic Society, " (1975) 3 M. L. J., 1.
9. Chatterton, P., " The Historical Dimension " in Peter Sack (ed.), Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
10. Crocombe, R. G., " The Niue Alternative " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
11. Doble, K. W., " Compensating Customary Owners for Mining Development, " CASLE Pacific Regional Meeting, 1981.
12. Dove, J., Mirung, T. and Togolo, M., " Mining Bitterness " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
13. Eaton, P., " Melanesian Land Reform: The Plantation Acquisition Scheme, " (1980) 8 M. L. J. 1 & 2.
14. Eaton, P., " More Stop than Go: Customary Land Policy since the Commission of Inquiry into Land Matters " (1983) Administration for Development, No. 20 pp. 43 - 52.

15. Eccleston, M. J., " The Acquisition of Land in PNG - A Changing Scene, " (1975)
Management in PNG 1 (1).
16. Evans, R., " Compensation for Loss and Damage and for Compulsory Acquisition of
Land " in Compulsory Acquisition of Land, Leo Cussen Institute for
Continuing Legal Education (ed.), 1981 pp. 11 - 20.
17. Fingleton, J. S., " Land Policy in PNG " in D. Weisbrot, A. Paliwala and
A. Sawyerr (ed.) Law and Social Change in PNG, Butterworths,
Sydney, 1982.
18. Fricke, G., Compulsory Acquisition of Land in Australia, (2nd. ed.), The Law Book
Company Ltd., Sydney, 1982.
19. Garner, J. F., " Compensation for the Compulsory Acquisition of Land: Some
General Observations " in J. F. Garner (ed.) Compensation for
Compulsory Purchase: A Comparative Study, The United Kingdom
National Committee of Comparative Law, London, 1975.
20. Goava, S., "Land Registration Policy" in Acquaye, B. and Crocombe, R. (ed.) Land
Tenure and Rural Productivity in the Pacific Islands, UNFAO, Rome,
1984 pp. 47 - 62.

21. Gobbo, J., " Introductory Remarks " in Compulsory Acquisition of Land, Leo Cussen Institute for Continuing Legal Education (ed.), Melbourne, 1981
pp. 1 -10.
22. Goldring, J., The Constitution of PNG: A study in Legal Nationalism, The Law Book Company Limited, Sydney, 1978.
23. Grove, D. S., " Land Registration " in Appendices (Part 2) to Land Tenure in PNG, UPNG, Port Moresby, 1976.
24. Gunton, R. J., " A Banker's Gamble " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
25. Hasluck, P., " Land Tenure in Papua and New Guinea " in Appendices (Part 2) to Land Tenure in PNG, UPNG, Port Moresby, 1976.
26. Haynes, C., " Succession to Land in PNG: Choice of Law, " (1981) 9 M. L. J. 1 & 2.
27. Haynes, C. E. P., Land Law and Land Policy in PNG: Text, Cases and Materials, (Parts 1 - 5), UPNG Printery, 1983.
28. Hinde, G. W., Introduction to Land Law, Butterworths, Wellington, 1979.

29. Hookey, J., " The Contribution of the Supreme Court to the Recognition of Customary Rights in Land " in Appendices (Part 1) to Land Tenure in PNG, UPNG, Port Moresby, 1976
30. Jacobs, J. W., and Fields, A. B., " Sovereignty Lands in Florida: Lost in a Swamp of Ambiguity " (1986) 38 University of Florida Law Review 3. pp. 347 - 405.
31. James, R. W., Land Tenure in PNG, UPNG Publications, Port Moresby, 1978
32. James, R. W., Land Tenure in PNG with Particular Reference to Unalienated Lands - Cases and Materials, UPNG, Port Moresby, 1976.
33. James, R. W., " The Role of the Courts in Attempts to Recover Alienated Land, " (1974) 2 M. L. J. 2.
34. James, R. W., " `Unalienated' Land Policies " (1983) 11 M. L. J.
35. James, R. W., " The Constitution and Land Rights, " in Administration for Development, the Administrative College of PNG, (1976) No. 7 pp. 3 - 20.

36. Kaipu, J., " The Land Redistribution Scheme at Work in the Gazelle, " in
Administration for Development, the Administrative College of PNG,
(1976) No. 7 pp. 69-77.
37. Kambipi, T. M., " Cash - Cropping and Population Pressure " in Peter Sack (ed.)
Problem of Choice: Land in Papua New Guinea's Future, ANU
Press, Canberra, 1973.
38. Kaputin, W., " Indefeasibility and Justice " in Peter Sack (ed.) Problem of Choice:
Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
39. Kassam, F. M., " Laws of Succession in PNG: Some Reflections, " (1974) 2 M. L. J. 1
40. Kilori, P., " A pilot Proposal" in Acquaye, B. and Crocombe, R. (ed.) Land Tenure
and Rural Productivity in the Pacific Islands, UNFAO, Rome, 1984
pp. 63-67.
41. Kimmorley, C. W., " Destruction or Adaptation " in Peter Sack (ed.) Problem of
Choice: Land in Papua New Guinea's Future, ANU Press,
Canberra, 1973.
42. Knetsch, J. and Trebilcock, M., Land Policy and Economic Development in PNG,
Institute of National Affairs, Inc., Port Moresby, 1981.

43. Lalor, W. A. " Land Law and Registration " in B. J. Brown (ed.) Fashion of Law in New Guinea, Butterworths, Sydney, 1969 pp. 137 - 157.
44. Lawrence, G., Condemnation: Your Rights When Government Acquires Your Property, Oceania Publications, Inc., New York, 1967.
45. Lenard, D., " Basic Procedure for the Acquisition of Alienated Land, " Acquisitions Section, Department of Lands, Port Moresby, (no. year.). (Copy personally held.)
46. Leyser, J., " Basic Procedure for the Trust Territory of New Guinea " in Appendices (Part 1) to Land Tenure in PNG, UPNG, Port Moresby 1976.
47. Lynch, C. J., " Customasing the Law " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
48. Mark, T., " Acquisition and Redistribution of Alienated Land: A Study in Access " (1975) Yagl - Ambu 2 (1). pp. 65 - 70.
49. Montgomery, D., Land Settlement Branch Manual, Department of Lands, Surveys and Enviroment, Port Moresby, 1978.

50. Montgomery, D., A Handbook of Information for Senior Land Settlement Officers, Department of Lands, Surveys and Environment, Port Moresby, 1979.
51. Olewale, N. E., " The Price of Progress " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
52. Oram, N., " Land and Race in Port Moresby " in Appendices (Part 1) to Land Tenure in PNG, UPNG, Port Moresby, 1976.
53. Oram, N. D. " Urban Expansion and Customary Land " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973 pp. 170 - 180.
54. Ottley, B. L., " Legal Control of Foreign Investment in PNG " (1976) 4 M. L. J. 2 pp. 147 -183
55. Owen, J., " Land Demercation in New Ireland, " (1980) 8 M. L. J. 1 & 2.
56. Parrish, H., Cripps on Compulsory Acquisition of Lands: Powers, Procedures and Compensation, (7th ed.) Stevens & Sons Limited, London, 1962.

57. Peta, N., " Customary Land Tenure and Land Alienation " in Administration for Development (1976) No. 7 pp. 35 -45.
58. Posman, K., " Expropriation of Private Foreign Investment: What is "Adequate " Compensation " (1982) 10 M. L. J. 1 & 2.
59. Ramsay, R. J., Handbook on Law Relating to District Officers, Administrative College of PNG, Port Moresby, 1980.
60. Riddall, J. G., Introduction to Land Law, Butterworths, London, 1974.
61. Sack, P. G., Land Between Two Laws: Early European Land Acquisition in New Guinea, ANU Press, Canberra, 1983.
62. Sack, P. G., " Alienation and Identity " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
63. Sack, P. G., " The Triumph of Colonialism " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
64. Sack, P. G., " Early Land Acquisition in New Guinea: The Native Version " in Appendices (Part 1) to Land Tenure in PNG, UPNG, Port Moresby, 1976

65. Sack, Peter and Bridget, The Land Law of German New Guinea: A Collection of Documents, ANU Press, Canberra, 1975.
66. Sack, P. and Clark, D., (ed.) German New Guinea: The Annual Report, 1902 - 1903, ANU Press, Canberra, 1979.
67. Sanders, D., " Compensation Schemes for Native Land Claims, " Seventh Waigani Seminar, UPNG, Port Moresby (no. year). (Copy available at UPNG Library.)
68. Simpson, R., " Land Tenure : Some Explanations and Definitions " in Appendices (Part 2) to Land Tenure in PNG, UPNG, Port Moresby, 1976.
69. Simpson, S. R., Land Law and Registration, Cambridge University Press, London. 1976.
70. Speedy, S. L., Compensation for Land Taken and Severed, Legal Research Foundation Inc., Auckland, 1978.
71. Spicer, J. A., " The Expropriation and Sale of German Plantations in the Mandated Territory " in Appendices (Part 1) to Land Tenure in PNG, UPNG, Port Moresby, 1976.

72. Standish, W. A., " Politics and Societal Trauma " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
73. Trebilcock, M. J. and Knetsch, J. L., " Land Policy and Economic Development in PNG, " (1981) 9 M. L. J. 1 & 2.
74. Umeh, J. A., Compulsory Acquisition of Land in Nigeria, Sweet & Maxwell, London, 1973.
75. Walter, D.M., The Oxford Companion to Law, Clarendon Press, Oxford, 1980.
76. Walter, M. A. H. B. (ed.) " Land Reform and the Plantations: What do we do about Plantations? " I. A. S. E. R. Monograph No. 15, 1981
77. Ward, A., " The CILM 1973: Choices, Constraints and Assumptions " (1983) 11 M. L. J.
78. Whalan, D. J., " Technical Law and the Outside Expert " in Peter Sack (ed.) Problem of Choice: Land in Papua New Guinea's Future, ANU Press, Canberra, 1973.
79. Zorn, J., " Fighting Over Land " (1976) 4 M. L. J. 1.

80. Zorn, J., " The Land Titles Commission and Customary Land Law: Settling Disputes Between Papua New Guineans " (1974) 2 M. L. J. 2

Government Publications.

81. The Report of the Commission of Inquiry into Land Matters, Port Moresby, 1973.
82. The Final Report of the Constitutional Planning Committee, Port Moresby, 1973.
83. The Constitution of the Independence State of PNG, Port Moresby, 1975.
84. Plantation in the PNG Economy, Central Planning Office, Port Moresby, 1974.
85. Papua New Guinea's Proposals to Australia for a Joint Scheme for Settlement of Alienated Land Problems, a Classified (" Secret ") Document, Department of Lands, Port Moresby, 1974.
86. Final Draft, Amalgamated Land Act, Land Law Reform, Drafting Instructions, Department of Lands, Waigani, 1982.
87. Compulsory Acquisition of Land: Determination of Compensation, Department of Lands, Surveys and Environment, Port Moresby, (no.year). (Copy personally held.)

88. Annual Report and Statement, Department of Lands and Surveys, Waigani, 1983.

89. Lands Acquisition and Compensation, the Australian Law Reform Commission
Report No. 14, Canberra, 1980.